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CONTENTS.

	M. L. J. Page.
Leaders:—	
Adoption devesting estate—Validity of	411
Bandhus—Who are:—By P. R. Ganapati Aiyar, B.A., B.L. ...	313
Civil Justice in the Madras Presidency	403
Criminal-Procedure Code, 1898:—By E. H. Monnier ...	189
Escheat under the Hindu Law:—By S. Sitarama Sastri, B.A. ...	375
Equitable set-off:—By P. Duraiswami Aiyangar, B.A., B.L. ...	222
Grounds of Criminal Jurisdiction:—By M. A. Tirunarayanachari, B.A., B.L.	110
Hindu Law—Adoption of an only son	1
Do. —Succession under the Mitakshara to woman's property inherited from a female:—By M. K. Vaidyanatha Aiyar, M.A., M.L.	198
Illegitimate son of a Sudra:—By T. Jivaji, B.A., B.L. ...	153
Inland Water-courses:—By T. Rajaram Rao, B.A., B.L. ...	263
Islands in Non-navigable Rivers	357
Law Reporting, the Art of:—By J. J.	455
New rules for Court of Small Causes, Madras, framed by the High Court under Act I of 1895	x, y, z—829
Succession of Cognates under the Mitakshara:—Jurisprudence ...	53
Do. do. :—II	99
Substantial justice—Discretion of Courts	16
Translations—	
Madana-Parijata, Chapter VIII	422
Vivadaratnakara, Chapters XVI—XVII	22
Do. do. XVIII—XXIII	72
Do. do. XXIV—XXX	125
Do. do. XXXI—XXXIV	164
Do. do. XXXV—XXXVII	216
Do. On payment of debts	277
Do. On sureties	324
Critical Notes—	
Chakkra Chapan v. Moidin Kutti ... 8 M. L. J., 231	464
Gnana Sambandha Pandara Sannadhi v. Velu Pandaram I. L. R., 19 M., 243	415

Notes of Indian Cases—

ALLAHABAD SERIES.

Aman Singh v. Narain Singh	I. L. R., 20 A., 98	294
Amjad Ali v. Muhammad Israil	20 A., 11	178
Balwant Singh v. Rani Kishori	20 A., 267	433

		M. L. J. Page.
Bansi Lal v. Ramji Lal	20 A., 370	473
Behari Lal v. Muhamma Muttaki	20 A., 482	474
Chuni Lal v. Harnam Das	20 A., 302	434
Daya Kishan v. Nanhi Begam	20 A., 304	434
Depi Das v. Nirpat	20 A., 365	472
Dip Narain Singh v. Hira Singh	19 A., 527	34
Dost Muhammad Khan v. Syed Begam ...	20 A., 81	293
Fazal Husen v. Raj Bahadur	20 A., 124	295
Ghazi v. Sukru	19 A., 515	32
Haji Syed Muhammad v. Gulab Rai ...	20 A., 345	435
Har Prasad v. Sheo Ram	20 A., 506	475
Imam Khan v. Ayub Khan	19 A., 517	33
Kamrak v. Sundar Nath	20 A., 299	433
Mahabir Prasad v. Sital Singh	19 A., 520	33
Maharaja of Bhartpur v. Kacheru	19 A., 510	32
Mul Chand v. Ram Ratan	20 A., 43	474
Nabbu Khan v. Sita	20 A., 2	177
Nihali v. Mittar	20 A., 446	473
N. W. P. Club v. Sadullah	20 A., 497	474
Puran Mal v. Krant Singh	20 A., 8	178
Sadiq Hussain v. Lalta Prasad	20 A., 139	295
Sha Muhammad Khan v. Banwant Singh ...	20 A., 311	434
Sheorania v. Bharat Singh	20 A., 90	294
Shiam Behari Lal v. Rup Kishore, ...	20 A., 379	473
Sri Gopal v. Prithi Singh	20 A., 110	294
Thaku Prasad v. Gaya Sahu.	20 A., 349	435
Thika Ram v. Sama Charan	20 A., 42	179

CALCUTTA SERIES.

Aga Mahomed Jaffer Bindanim v. Koolsom Beebee ..	25 C., 9	34
Akikunnissa Bibee v. Roop Lal Das... ...	25 C., 133	231
Bhiku Khan v. Zahuran	25 C., 291	233
Bindhubashini Dassi v. Harendra Lal Roy ...	25 C., 305	234
Choa Lal Dass v. Anant Pershad Misser ...	25 C., 233	232
Collector of Dinagpur v. Girja Nath Roy ...	25 C., 346	291
Durga Prasad Banerjee v. Lalit Mohun Singh Roy ...	25 C., 86	230
Enamul Huq v. Ekramul Huq	25 C., 294	233
Gour Mohun Gouli v. Dino Nath Karmokar ...	25 C., 49	35
Jagannath Prasad Gupta v. Runjit Singh ...	25 C., 354	292
Kali Kishore Deb Sarkar v. Guru Prosad Sukul ...	25 C., 99	230
Kali Pado Mukerjee v. Dino Nath Mukerjee ...	25 C., 315	234
Kali Prosanno Ghose v. Rajani Kant Chatterjee ...	25 C., 141	232
Modhu Sudan Singh v. Hooko	25 C., 1	34
Mohendra Lall Mitter v. Anundo Coomar Mitter ...	25 C., 236	232
Prohlad Teor v. Kedar Nath Bose	25 C., 202	234

		M. L. J. Page.
Radha Rani Dassi v. Brindabun Chundra Basack	25 C., 329	235
Ram Narain Joshy v. Parmeswar Narain Mahta ...	25 C., 39	35
Ram Narain Singh v. Mina Koery	25 C., 46	35
Saral Chand Mitter v. Mohun Bibi	25 C., 371	292
Sarat Chandra Banerjee v. Bhupendra Nath Bosu ...	25 C., 103	231
Secretary of State for India in Council v. Rajlucki Debi	25 C., 239	233
Shama Churn Mitter v. Wooma Churn Haldar ...	25 C., 36	34

MADRAS SERIES.

Achuta Menon v. Achutan Nayar	20 M., 35	136
Balusami Pandithar v. Narayana Rau ...	20 M., 342	81
Barbar Maran v. Ramana Goundan... ...	20 M., 461	84
Bojjamma v. Venkataramayya	21 M., 30	136
Gantapalli Appalamma v. Gantapalli Yellayya ...	20 M., 470	84
Ittappan v. Manavikrama	21 M., 153	334
——— v. Parangodan Nayar	21 M., 291	433
Jagapathy Mudaliar v. Ekambara Mudaliar ...	21 M., 274	386
Kasturi Chetti v. Deputy Collector of Bellary ...	21 M., 269	385
Krishnan Nambiar v. Kannan	21 M., 8	135
Krishnasami Ayyangar v. Ranga Ayyangar ...	20 M., 369	82
Marudamuthu Nadan v. Srinivasa Pillai ...	21 M., 128	334
Muthappudayan v. Ammani Ammal ...	21 M., 58	177
Nayinappa Chetti v. Chidambaram Chetti ...	21 M., 18	135
Pichuvayyan v. Vilakudiyan Asari	21 M., 134	334
Ponnambala Pillai v. Sundarappayyar ...	20 M., 354	81
Queen-Empress v. Motha	20 M., 239	81
Ramalinga Chetti v. Raghunatha Rau ...	20 M., 418	83
Ramasamayyan v. Veerasami Ayyar ...	21 M., 222	336
Ramasami Kottadiar v. Murugesa Mudali ...	20 M., 452	83
Rangayya Appa Rao v. Ratnam	20 M., 392	82
Rangayyar v. Srinivasa Ayyangar	21 M., 56	176
Rego v. Abu Beari	21 M., 151	335
Sami Ayyangar v. Ponnammal	21 M., 28	136
Sanjivi v. Jalajakshi	21 M., 229	337
Seshadri Aiyangar v. Nataraja Aiyar ...	21 M., 179	336
Subramania Ayyar v. Saminatha Ayyar ...	21 M., 69	177
Suryanarayana Pandarathar v. Gurunadha Pillai ...	21 M., 257	385
Theyyavelan v. Kochan	21 M., 7	135
Uthunganakath Avuthala v. Thazhatharayil Kunhali	20 M., 435	83
Vasudeva Upadyaya v. Visvaraja Thirthasami ...	20 M., 407	82
Venkatasubramaniam Chetti v. Thayarammah ...	21 M., 263	385
Viru Mamma v. Krishnan	21 M., 141	334
Visvalinga Pillai v. Palaniappa Chetti ...	21 M., 1	134

M. L. J.
Page.

Summary of Recent Cases.

Indian Cases:

ALLAHABAD WEEKLY NOTES.

Amba Prasad v. Narain Das ...	A. W. N. for 1898	18	85
Bhagirathi Misr v. Sheobhik ...	...	59	181
Phulchand v. Chhote Lal ...	...	54	180
Prasadi Lal v. Imdad Husen ...	...	10	85
Secretary of State for India v. Sukhdeo	...	173	487
Sham Krishna v. Ram Das ...	...	9	85
Shankar Dat Dube v. Radha Krishna	...	17	84
Sundar Singh v. Bholu ...	...	58	180

BOMBAY PRINTED JUDGMENTS.

Abdul Kadar v. Bapubhai Valad Sheik Imam	301
Adarji Dorabji Ghaswala v. Rajaram Jhurakhanlal Kalal ...	37
Amratlal Ramdas v. Bavaji Bhonji	392
Bai Jasoda v. Bamanshah Mancherji	393
Bai Nani v. Chunilal Jeshankar	36
Bai Rambai v. Bai Mani	298
Balaji Vasudev Habbu v. Rudrapa bin Mudkapa	298
Balwant Ganesh Oze v. Secretary of State for India in Council ...	37
Bapuchand v. Govind	297
Bhaskar Vishnu Phadke v. Sakharam Narayan Pathe ...	393
Bhawrao bin Mahimajirao Nhadek v. Bhakhmankom Raghojirao bin Tulaprao Kadan	297
Gopal Balkrishna Kenjab v. Vishnu Raghunath Kenjab ...	298
Hazrat Amir Begam v. Nawab Mir Narudin Husen Khan ...	36
Murarao Zimajirao Dalvi v. Sitaram Keshav Pandse ...	300
Narayan Ganesh Joshi v. Ramachandra Vishnu Joshi ...	36
Payapa Akkappa Patel v. Appanna Bin Bhimappa ...	392
Ramchandra Krishna Rajwade v. Ganesh Bapuji Dhavah ...	395
Rango Balaji v. Mudiyeppa bin Mallappa	337
Sadashiv Vaman v. Dhamankar v. Trimbak Divakar Karandekar ...	299
Sakharam bin Ranoji v. Devji Antoba	396
Shri Beharilalji Bhagwatprasadji v. Bai Rajbai	395

CALCUTTA WEEKLY NOTES.

Mungun Jha v. Dulhin Golab Koer, 2 C. W. N., 365 ...	179
Sarat Chunder Dutt v. Kedar Nath Doss	180

English Cases.—

APPEAL CASES.

Barraclough v. Brown and others ...	1897, A. C., 615	86
Birmingham Vinegar Brewery Company, Limited, v. Powell	A. C., 710 1897	88

			M. L. J. Page.
Eccles *v.* Mills		1898, A. C., 360	301
London Tramways Company, Limited *v.* The London County Council		1898, A. C., 375	340
Mayor, etc., of the County Borough of Derby *v.* Derbyshire County Council		1897, A. C., 550	41
Owner of No. 7 Steam Sand Pump Dredger *v.* Owners of S.S. "Greta Home"		1897, A. C., 996	86
Simpson *v.* The Mayor, etc., of Godmanchester ...		1897, A. C., 696	87
Young *v.* Adams		1898, A. C., 469	341

CHANCERY DIVISION.

Ackerman *v.* Lockhart, *in re* Hawkes	...1898,	II Ch., 1	338
Ajello *v.* Worsley ...	... „	I Ch., 274	235
Bateman, Lady, *v.* Faber ...	... „	I Ch., 144	138
Bence *v.* Shearman ...	... „	II Ch., 582	476
Cronmire *in re*, Ex-parte wand...	...	...	388
Deighton and Harris Contract, *in re*	... „	I Ch., 458	303
DeNicols *v.* Curlier, *in re* DeNicols	... „	II Ch., 61	339
Felix Hadley and Co. *v.* Hadley	... „	II Ch., 680	477
Hobson *v.* Tulloch ...	... „	I Ch., 424	238
Hocking Michell *v.* Loe ...	... „	II Ch., 567	476
Hoddinott *v.* Biggs ...	... „	II Ch., 307	387
Hopkins *v.* Hemsworth	... „	II Ch., 347	387
Jennings *v.* Jennings ...	... „	I Ch., 378	237
Kay *v.* Dewhirst, *in re* Wilcock	... „	I Ch., 95	40
Levy *v.* Stogdon ...	... „	I Ch., 478	303
London Drapery Store, *in re* ...	... „	II Ch., 684	478
McLeod *v.* Power ...	... „	II Ch., 295	342
Paget *v.* Paget, ...	... „	I Ch., 47	983
Pinet & Cie *v.* Maison Louis Pinet, Ld.	... „	I Ch. 179	13
Pollock *v.* Garle ...	... „	I Ch., 1	38
Raleigh *v.* Goschen ...	... „	I Ch., 73	39
Richard *v.* Jones, *in re* Jones ...	... „	I Ch., 438	239
South African Republic *v.* La Compagnie Franco Belge &c. ...	... „	I Ch., 191	139
Woods and Lewis' contract, *in re*	... „	I. Ch., 433	238

QUEEN'S BENCH.

Blake *v.* Woolf, ...	...1898,	2 Q. B., 426	391
Bryant *v.* Hancock & Co., Ld. ...	... „	I. Q. B., 716	305
Gilbert, *in re*; ex parte Gilbert	... „	I. Q. B., 282	236
Gower *v.* Couldridge ...	... „	I. Q. B., 348	237
Groves *v.* Wimborne (Lord)	... „	II. Q. B., 402	389
Huttley *v.* Simmons ...	... „	I. Q. B., 181	139

		M. L. J. Page.
Jones v. Scallard	II Q. B., 565	478
Monkswell, Lord, v. Thompson	I. Q. B., 479	240
Montgomery, Jones & Co., v. Liebenthal & Co. ...	I. Q. B., 487, C. A.	240
Sumpter v. Hedges	I. Q. B., 673	304
Watson v. Sandie and Hull	I. Q. B., 320	23

TABLE OF CASES CITED

IN THIS VOLUME.

A.

Abdul Aziz, Re, ...	I. L. R., 14 A., 49	190
Adjudhia Pershad v. Baldeo Singh, ...	I. L. R., 21 C., 818	434
Akshoy Kumar Nundi v. Chunder Mohun Chathati,	I. L. R., 16 C., 250	295
Amava v. Mahadgauda, ...	I. L. R., 22 B., 416	412
Amir Hassan v. Sheo Baksh, ...	I. L. R., 11 C., 6	466
Amrita Kumari v. Lakshinarayan,	2. B. L. R. (F. B.), 28	314
Amrita Kumari Debi v. Lakshinarayan Chuckerbutty, ...	2. B. L. R. (F. B.) 28	54
Ananda Chundar Singh, in the matter of v. Basu Mudh, ...	I. L. R., 24 C., 167	197
Arnold v. Mundy (1821) 10 Amer. Dec. 385 ...		359, 362
Arunachallam v. Iyasami, ...	I. L. R., 1 M.	1
Arunachallam Chetty v. Meyyappa Chetty, ...	I. L. R., 21 M., 91	294
Attorney-General v. Davey, ...	4 De. J. & J. 136	475
Attorney-General for Hong Kong v. Kwok-a-Singh	L. R., 5 P. C., 180	119
Aumirtolall Bose v. Rajoneekant Mitter,	I. L. R., 2 I. A., 113	418

B.

Babu Anaji v. Ratnoji Krishnarau, ...	I. L. R., 21 B., 319	414
Babu Lal v. Nanku Ram, ...	I. L. R., 22 C., 339	316
Badische Aniline and Soda Fabrik v. Maneckji-Shapurji Katrak, ...	I. L. R., 17 B., 584	114
Ballard v. Tomlinson, ...	54 L. J., Ch. 454	271
Balwant Rao Biswant Chandrachor v. Purun Mal Chanbe, ...	L. R., 10 I. A., 90	416
Barney v. Keokuk, ...	4 N. S. Rep. (1896), pp. 324, 338	359
Beasley v. Darcy, ...	Sch. and Lef. 403 n.	225
Beni Prasad v. Hardai Bibi	I. L. R., 14 A., 67	1, 4
Benodi Coomaree Dosee v. Soudaminey Dosee, ...	I. L. R., 16 C., 252	435
Bhagbat v. Ramdeb, ...	I. L. R., 11 C., 557	222, 224
——— ——— ...	I. L. R., 16 C., 711	228

		M. L. J. Page.
Holker v. Poritt, ...	8 Ex. 107	274
Hopkins v. Great Northern Railway Company, ...	2 Q. B. 224	291
Huggins v. Tweed, ...	10 Ch. D., 359	228
Humble v. Mitchell, ...	11 A. & E., 205	465
Huxley v. West London Extension Railway Company, ...	L. R., 14 A. C., 26	19

I.

Imperatrix v. Juma	I. L. R., 20 B., 54	120
Inderun v. Ramasawmy, ...	13 M. I. A., 141	155
Ingraham v. Wilkinson (1826),... ...	16 Amer Dec. 342	362

J.

Jagannath Das v. Birbhadra Das, ...	I. L. R., 19 C., 776	416
Jai Narayan v. Queen-Empress, ...	I. L. R., 17 C., 862	195
Jai Prakash Lal, *Re*	I. L. R., 6 A., 26	189
Jamal Saheb v. Murgayya Swami, ...	I. L. R., 10 B., 34	420
James v. Kinnier, ...	5, Ves. 110	227
Jamsang v. Devabhai v. Goyabhai Kikabhai, ...	I. L. R., 16 B., 409	435
Jeff v. Wood, 2 Peere, ...	Will. Rep. 129	227
Jeffreys v. Boosey, ...	4 H. L. R., 815	113
Jenner v. Merris, ...	30 L. J., Ch. 361	227
Jewan Doss Sahoo v. Shah Kubeer-ood-deen, ...	2 M. I. A., 292	419
Jogendra Bhupati v. Nityanand Man Sing, ...	I. L. R., 11 C., 715	156,160, 161,164
Jogendra Bhupati Hurrochandra Mahapatra v. Nityanund Man Sing, ...	I. L. R., 18 C. 152	160,162,164
Jowahir Rahoot v. Mussamut Kailasoo, ...	1 W. R., 74	313

K.

Karamali Rahimbhoy v. Rahimbhoy Habibhoy, ...	I. L. R., 13 B., 137	473
Kalee Pershad Shaha v. Ram Pershad Shaha, ...	18 W. R., 14	19
Kalee Kishen Tagore v. Judoo Lall Mullick, ...	5 C. T. R., 97	362
Kameswar Pershad v. Rajkumari Ruttun Koer, ..	19 I. A., 234	21,294
Kazi Gulam v. Aga Khan, ...	6 B. H. C. R., O. C. 93	197
Khadijah v. Abdool Kurreem, ...	I. L. R., 17 C., 344	197
Khagendra Narain v. Matangini, ...	17 I. A., 61	362
Kirpal Narain v. Tukurmoni, ...	I. L. R., 19 C., 91	155
Kissen Lala v. Javellah Prasad Lala, ...	3 M. H. C., 346	—
Kishorchand v. Madhowji, ...	I. L. R., 4 B., 407	222, 224, 229
Komarazu Lunka Case [Mad Sud De (1858) 189]	...	357
Krishnasawmi Pillai v. Municipal Commissioners for the Town of Madras, ...	4 M. H. C. R., 120	223

		M. L. J. Page.
Krishnayan v. Muthusawmy, ...	.. I. L. R., 7 M., 407	157, 160, 163, 164
Krishtamma Naidu v. Chapa Naidu,	.. I. L. R., 17 M., 411	467
Kumaravelu v. Virana Goundan,	.. I. L. R., 5 M., 29	69
Kuppa v. Singaraveloo, ...	.. I. L. R., 8. M., 325	155

L.

Lakshmappa v. Ramava, ...	.. 12 B. R. C. H., 364	1
Lalchand v. Queen-Empress, ...	.. I. L. R., 18 C., 1549	195
Lallubhai Bhapubhai v. Cassibai,	.. I. L. R., 5 B., 110	316
———— v. Mankuvarbai,	.. I. L. R., 2 B., 388	316
Lalubhai Surchand v. Bai Amrit,	.. I. L. R., 2 B., 300	55, 56
Lukhy Kant Bhose, in the matter of	.. I. L. R., 1 C., 180	469
Lukimdas Khimji v. Haridas, ...	.. I. L. R., 6 B., 700	475

M.

Madhava v. Narayana ...	.. ...	———
Maharani Rajroop Koer v. Syed Abul Hossein ..	7 I. A., 240	272
Mahomed v. Ganapati ...	.. I. L. R., 13 A., 278	21, 420
Mahomed Ali Hadji v. Queen-Empress	.. I. L. R., 16 C., 612	191
Manick Chunder Dutt v. Bhuggobutty Dossee	.. I. L. R., 3 C., 443	1
Manilal Rewadat v. Bai Rewa	I. L. R., 17 B., p. 758 at p. 763	214
——— Sahoo v. Collector of Sarun	.. B. L. R., Appl. 93	369
Mari v. Chinnammal ...	.. I. L. R., 8 M., 107	69
Mason v. Brentini ...	..1880, 15 Ch. D., 287	230
Mateghosh, *Re* ...	.. 1 C. W. N., 561	195
Mayna Bibi v. Uttaram ...	.. 2 M. H. C. R., 191	164
Mayor of Colchester v. Brooke ...	.. 7 Q. B., 339	362
Mayor of Lynn v. Turner ...	.. 1 Cowper, 35	362
McColugh v. Wall (1850), 53 ...	... Amer. Dec. 715	359, 375
Michael v. Briggs ...	... I. L. R., 14 M., 362	474
Miles v. Rose, ...	... 5 Taunton, 705	362
Miller v. Mendenhall ...	(1890), 19 Amer. St. Rep. 226	359
Minor v. Gilmour ...	... 12 M. P. C., 131	269
Modho Kooery v. Tekain Ram Chunder Singh ...	I. L. R., 9 C., 411	420
Mohini Mohun Das v. Khejah Ahsanoollah ...	17 W. R., 73	362
Motilal Bechardass v. Ghellabhai Hariram ...	...	
Muhammad Suleman Khan v. Muhammad Yar Khan	I. L. R., 17 A., 39	434
Mussammat Lachhan Kunwar v. Anant Singh ...	22 I. A., 25	179
Mussumutt Thakoor Deyhee v. Rai Baluk Ram...	11 M., 1 A., 139	200
Muthammal v. Venkatalakshmiammal ...	I. L. R., 5 M., 32	69
Muthusami v. Sunambedu Muthukumarasami ...	23 I. A., 83	314
——— v. Venkatasubba ...	... 2 M. A. C. R., 293	155
Muthu Vaduganathar Tevar v. Dorasinga Tevar...	I. L. R., 3 M., 290	201, 203
Muttappa Udayan v. Ammani Ammal ...	3 M. L. J. Rep., p. 9	215
Myna Boyee v. Ootaram ...	... 8 M. I. A., 400	164

		M. L. J. Page.
N.		
Narain *v.* Rakhal ...	I. L. R., 1 C., 1	155
Narasanna *v.* Gangu ...	I. L. R., 13 M., 132	164
Narasayya *v.* Venkayya ...	2 M. L. J., 149	198, 210, 214
Narasimha Sastrial *v.* The Secy. of State for India	1 M. L. J., 167	270, 276
Narayanasawmy *v.* Kuppusawmy ...	I. L. R., 11 M., 43	1
Nasarat-ullah *v.* Mujib-ullah ...	I. L. R., 13 A., 309	435
Nelson *v.* Stocker ...	4 De. Ex. H. J. 458	293
Nemchand *v.* Hemchand Dharamchand ...	I. L. R., 4 B., 515	465
Nilmony Singh *v.* Jagabandhu Roy ...	I. L. R., 23 C., 545	422
Nield *v.* L. N. W. Ry. Co. ...	L. R., 10 Ex. 4	277
Nirgulkhan *v.* Durga ...	I. L. R., 15 A., 9	224
Nilkandan *v.* Padmanabha, ...	I. L. R., 14 M., 153	419
Nilakandhen Nambudripad *v.* Padmanabha Revi Varma ...	I. L. R., 18 M., 1.	491
Nivavahoo *v.* Turner ...	L. R., 16 I. A., 156	465
Nobin Kristo *v.* Russick Lal ...	I. L. R., 10 C., 268	194
Nogender Chunder Ghose *v.* Mahomed Eusoff, ...	18 W. R., 113	266
——————— ...	10 B. L. R., 406	361, 366
Nuttel *v.* Bramwell ...	L. R., 2 Ex. 1	271
O.		
Orr and others *v.* Raman Chetti ...	I. L. R., 18 M., 320	274
Oudh Behari *v.* Nageshar, ...	I. L. R., 13 A., 278	434
P.		
Padma Coomari *v.* The Court of Wards ...	8 I. A., 229	411
Pahalwan Singh *v.* Maharaja Muneessur ...	9 B. L. R., 150	366
Pandaiya *v.* Puli, ...	1 M. H. C. R., 479	155
Panjab Singh, in the matter of. ...	I. L. R., 6 C., 579	191
Papireddi *v.* Narasareddi ...	I. L. R., 16 M., 464	433
Parvati *v.* Thirumalai ...	I. L. R., 10 M., 334	157, 160
Parvati Ammal *v.* Saminatha Gurukal ...	I. L. R., 20 M., 40	292
Phillips *v.* Hudson, ...	2 Ch. Ap. 243	419
Ponnappa Pillai *v.* Pappuvaiyyangar ...	I. L. R., 9 M., 343	337
Ponnusami Tevar *v.* The Collector of Madura ...	5 M. H. C. R., 29	276
Poresh Nath Mojumdar *v.* Ramjodu Mojumdar ...	I. L. R., 16 C., 241	434, 473
Pragilal *v.* Maxwell, I. L. R., 7 A., 284 ...	...	224, 229
Prosunno Kumari Debya *v.* Golabchand Baboo ...	L. R., 2 I. A., 150	419
Puran Chand *v.* Roy Radha Kishen ...	I. L. R., 19 C., 132	434
Puran Mal *v.* Ali Khan ...	I. L. R., 1 M. 235	416
Q.		
Queen-Empress *v.* Amirkhan ...	I. L. R. 8 M., 336	194
——————— *v.* Balasinnatambi ...	I. L. R., 14 M., 334	194
——————— *v.* Chagan ...	I. L. R., 14 B., 331	194

		M. L. J. Page.
Queen v. Chotey Lal ...	... 3 N. W. P. 271	197
Queen-Empress v. Chotu ...	... I. L. R., 9 A., 52	194
Queen v. Kassy Singh ..	... 21 W. R., 61	197
Queen-Empress v. Dorabji Hormasji	... I. L. R., 10 B., 131	194
——— v. Enamreddi ...	.. I. L. R., 8 M., 296	194
——— v. Fattah Chand	... I. L. R., 24 C., 499	195
——— v. Ganga Ram ...	... I. L. R., 16 A., 136	433
——— v. Grees Chander Banerjee	... I. L. R., 10 C., 1024	193
——— v. Hasnu, ...	... I. L. R., 6 A., 367	194
——— v. Hayfield ...	... I. L. R., 14 A., 212	193
——— v. Krishnaji ...	... I. L. R., 14 B., 436	193
——— v. Maniruddin Mundul	... I. L. C., 18 C., 75	194
——— v. Mannathachari	... I. L. R., 17 M., 260	84
——— v. Mona Puna ...	... I. L. R., 16 N., 661	194
——— v. Montopoulo ...	... I. L. R., 19 B., 741	120
——— v. Nilmadhub Mitter	... I. L. R., 15 C., 595	195
——— v. Paranga ...	... I. L. R., 16 M., 468	121
——— v. Reolah ...	... I. L. R., 14 C., 887	194
——— v. Sagal ...	... I. L. R., 21 C., 642	192,193,195
Queen v. Sham Kishore Holdar...	... 13 W. R., 36	197
Queen-Empress v. Solomon ..	... I. L. R., 17 C., 930	193
——— v. Theo Dial Lal	... I. L. R., 16 A., 389	122
——— v. Venkatapthi...	... ...	193
——— v. Viran ...	... I. L. R., 9 M., 224	195

R.

R. v. Anderson	... L. R. I. C. C., 161	115
— v. Carr	... 10 Q. B. D., 76	115
— v. Keyn	... 7 Co. Rep. 6. a	111, 113
— v. Matony	... M. H. C., 93	122
— v. Ruck, 2 Rus Crimes ...	... 5th Edn. 46	123
— v. Satler	... D. and B. 525	119
— v. Serva	... 2 C. and K. 53	119
— v. Thorpe	... Lev. C. C., 233	124
— v. Trafford, 8 Bing. 204 ...	... ...	276
— v. Welsh, 1 Moody, ...	... C. C., 175	123
Radhabai v. Anantraov Bhagvant Deshpande ...	...	—
Rahi v. Govind	... I. L. R., 1 B., 97	155, 160
Raja Upendra Lal Roy v. Srimati Rani Prasanna Mayi	1 B. L. R., 221	1,15
Raja Vurma Valia v. Ravi Varma Kunhi Kutty...	I. L. R., 1 M., 235	416
Rajendro Chunder Roy Re ...	... I. L. R., 11 C., 737	190
Ramagopal v. Majeti Mallikarjunudu	... I. M. H. C. R., 396	223
Ramalakshmamma v. The Collector of Godavari...	5 M. L. J., 244	266, 358
Ramasami v. Narasamma ...	... I. L. R., 8 M., 133	69
Rameshar Pershad Narain Singh v. Koonj Behari Pattuk,	6 I. A., 33	272

		M. L. J. Page.
Ramji v. Ghaman ...	... I. L. R., 6 B., 498	412, 414
Ram Kali v. Kedar Nath ...	... I. L. R., 14 A., 156	179
Ram Lal v. Tulsa Kuar ...	... I. L. R., 19 A., 180	474
Rampratap v. Ganesh Ranghath	... I. L. R., 12 B., 31	226
Ranoji v. Khandoji ...	... I. L. R., 8 M., 557	157
Ratna Mudaliar v. Raghunatha Bhattar	... 8 M. L. J., 319	414
Ratnasubbu v. Ponnappa ...	... I. L. R., 5 M., 69	314
Rawley v. Rawley ...	... 1 Q. B. D., 469	222
Rawson v. Samuel ...	... Cr. and Phil. 161	224
Rex v. Montague ...	... 4 B. and C., 598	362
Rodgers v. Comtoir D'escompte de Paris	... I. R., 3 P. C., 465	296
Roulet v. Fetterle ...	... I. L. R., 18 B., 719	223
Routledge v. Low ...	...I. L. R., 3 H. L., 100	114
Rupchand v. Rukhmabai ...	... 8 B. H. C. R., 114	413

S.

Sadhu v. Baiza,... ...	... I. L. R., 4 B., 37	155, 156, 160, 164
Salamma v. Latchmana Reddi ...	... 8 M. L. J. Rep., 14	215
Saner v. Bilton, 1879 ...	... 11 Ch. D. 416	230
Sarad Chunder v. Gopal Chunder	... I. L. R., 20 C., 299	293
Sarat Sundari Debya v. Soorjyakant Achargi	... 25 W. R., 242	369
Sasivarna Tevar v. Arulanandham Pillai	... I. L. R., 21 M., 261	385
Secretary of State for India v. Kadir Kutti	... I. L. R., 13 M., 369	266, 361
Sengamalathammal v. Velayuda Mudali	... 3 M. H. C. R., 312	198,204, 208,210
Seshagiri v. Girewa ...	... I. L. R., 14 B., 282	160
Sethurayar v. Shunmugam Pillai	... 7 M. L. J., 279	35
Shem Shah v. Queen-Empress ...	... I. L. R., 20 C., 642	191
Shri Dharnidhar v. Chinto ...	... I. L. R., 20 B., 250	414
Siddha v. Biligiri ...	... I. L. R., 7 M., 354	120
Sivasangu v. Minal ...	... I. L. R., 12 M., 277	164
Smith v. Lord Brownlow, ...	... 9 Eq., 241	4191
Sree Rajah Oppalapaty Jogee Jagannadharauze v. Sub-Collector of Rajahmundry, ...	Mad. sud Dec. (1858), 189	375
Sri Balaram Gurulingaswami v. Sri Balasu Rama Lakshmamma	I. L. R., 18 M., 53	1
Srinath Roy v. Ainaddi Halder,...	... I. L. R., 24 C., 395	194
Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu	I. L. R., 19 M., 249	475
St. Louis v. Rutz ...	... 138 N. S. R., 226	374
State v. Carter, 3 Dutch, 501 ...	... ...	119
Stooke v. Taylor, 1880, ...	... 5 Q. B. D., 576	223
Stunmore v. Campbell (1892), 1 Q. B., 317	... ...	225
Subbayyar v. Ganesa Aiyyar	... I. L. R., 18 M., 183	385

		M. L. J. Page.
Subbiah *v.* Yerlagadda Ankinidu	... 1 M. H. C. R., 255	357
Subrahmania Chetti *v.* Authi Narayanan	.. 7 M. L. J. Rep. 288	294
Subbaramayyar *v* Nigamathullah Saheb	...I. L. R., 18 M., 342	416
Swindon Water Co. *v.* Wilts and Berks Canal	... ...	269

T.

Taque Jan *v.* Obaid-ulla ...	... I. L. R., 21 C., 866	29
Tej Ram *v.* Har Sukh	... I. L. R., 1 A., 101	46
Thakoorin Sahiba *v.* Mohun Lal	... 11 M. I. A., 386	31
Thangum Pillai *v.* Suppa Pillai	... I. L. R., 12 M., 401	156,162
Tharachuru *v.* Suresh Chunder Debi	... 16 I. A., 166	411
Thayammal *v.* Venkatarama	... 14 I. A., 67	411
Tolson *v.* Kaye, 3 Brod and Birgh	... 217	419
Trustees of Hopkin's Academy *v.* Dickinson	... 9 Cush, 548	374
Tukaram Anant Joshi *v.* Vithal Joshi	... I. L. R., 13 B., 656	178
Tupsu Koer, *Re.*	... 15 W. R. Cr. 23	196

U.

Umarid Bahadur *v.* Udoi Chand	... I. L. R., 6 C., 119	55, 316, 320

V.

Vaidyanatha Ayyar *v.* Chinnasami Naik	... I. L. R., 17 M., 108	473
Vallabha Valiya Rajah *v.* Vedapuratti	... I. L. R., 19 M., 249	474
Vasudeva Upadhyaya *v.* Visvanatha Thirthasami,	I. L R. 20 M., 407	470
Veera Perumal *v.* Narrain Pillay, Strange's Notes of Cases	... 91 & 125	1
Venkatachalla *v.* Parvatham ...	... 3 M H. C. R., 134	155
Venkatacharyalu *v.* Rangacharyulu	... I. L. R., 14 M., 316	32
Venkata Reddi *v.* Taylor ..	... I L. R., 17 M., 100	472
Venkataramakrishna Rao *v.* Bujanga Rao	... I. L. R., 19 M., 107	198
———	110	208
———		210
———		214
Vijendra Tirtha Sami *v.* Sudhindra Tirtha Sami	19 M., 197	433
Viraraghava Aiyangar *v.* Venkatacharyar	... I. L R., 5 M., 217	473
Virasangappa *v.* Rudrappa ..	... I L. R., 19 M., 110	198,208, 214

W.

Wales *v.* Bailey, 1887, 3 Amer. St. Rep. 48	...	359,362,371
Walker *v.* Clements ..	... 15 Q. B., 1046	229
——— *v.* Shephardson ...	(1855), 15 Amer. Dec. 325	362
Waman Raghupati Bova *v.* Krishnaji Kashiraj Bova	... I. L. R., 14 B., 249	1

		M. L. J Page.
Watson v. The Michwales Railway Co. ...	36 L. J. C. P., 285	227
Wazir Mahton v. Lulit Singh ...	... I. L. R., 9 C., 100	295
Whittaker v. Rush ...	... Ambler 407	223
Wiggenborne v. Kauntz ...	(1888), 8 Amer St. Rep. 150	362
Wilmot v. Barber ...	... 17 Ch. D., 772	20
Wood v. Waud ...	... 3 Ex. 777	272

Y.

Young v. The Bank of Bengal ...	... 1 M. I. A. 87	225

JOTTINGS AND CUTTINGS.

Advocate-General, Madras	90
Agency	248
Allurements to children	97
American Cases,—notes of	346, 401 479
——— method of treating crime, English view of	446
Anti Ticket Scalping Laws,—Constitutionality of	398
Attaching a dead body for debt	244
Banks	248
Boddam,—Mr. Justice	345
Carcers,—duty of	45
Champerty,—What constitutes.	42
Circuit by Judges	350
Contracts	248, 249
Counsel as witnesses	400
Criminal Evidence Bill, English	246
Damages	44
Delivery...	251, 442
De Minimis	241
Deposition,—Taking of	355
Dissenting opinions,—Evils of	141, 306
District Munsifs,—Power of appointing	344
Dogs as witnesses	183
Draft for collection	248
Education,—Legal, in the Continent and America	103
Estoppel	44
Facietie...	440
Field,—Mr. Justice	181
French Language,—Use of, in English Court	484
Gift	442
Hotel proprietor's right to allow his guests to use his telephone ...	445

	M. L. J. Page.
Husband seducer	441
Ice not a necessity for administering justice	347
Injunction to restrain an unlicensed person from practising law	351
Innovation in jurisprudence	307
Jaimini's mimasa :—is it an authority	343
Joint traffic decision	485
Judge cogitating audibly	244
Judge's Notes of Evidence	345
Law Graduates,—Good advice to	51
—— Lectures—Their value and the secret of their success	148
—— Schools in America,—Statistics of	398
Lawyer and his client	182
——, learned	243
Lawyers and Politics	46
—— v. Rest of Mankind	481
Legal laughs	143, 182 399, 487
Life Insurance	450
Lockwood, Sir Frank,—The late	150
Madras Bench and Bar	343
—— High Court Miscellaneous Cases—Disposal of	91
—— —— Patronage and power of superintendence exercised by	344
—— ——, Sittings	91, 438
Master of Irish Legal Repartee	253
Medical Services—Gratuitous—Liability for	44
Misconduct of counsel	355
Murderer's anxiety	140
Mutilation of dead body	44
Nation's Anchor, by Justice Brewer	253
Negligence of Telegraphic Company	354
Notice	250
Notice to quit	251
Parry, Judge—One of the stories told by	442
Passengers—Rights of, holding transfer ticket	310
Perjury—Prevalence of the crime of	95
Petheram on the Privy Council	397
Phillimore, Mr. Justice, on facilities to dissolve marriage	442
Pittapore Case	439
Promise to pay for services	248
Property	250, 251
Proximate cause of accident	309, 453
Railway seats—Law of	93
Registry of Deeds	250
Res judicata	452
Russel, Lord—Some stories of	142, 348
Sales	251

	M. L. J. Page.
Scholarship—Attachment of	96
Sedition Act	90
Spiritualistic medium	303
Specific performance	249
Statute of Frauds	249
Stranger to consideration	249
Succession of cognates under the Mitakshara	140
Suicide	450
Tenant-at-will	
Torts	44, 97
Wife,—Right to action for inducing husband to desert her ...	355
Wills, extraordinary	242
Woman witness	243
Zola's defence	352

REVIEWS.

Aliya Santana Law and Usage,—A Treatise on, by G. Krishna Rao ...	484
Criminal Procedure Code by C. H. Sohoni	402
Digest—General,—American and English Quarterly advance sheets ...	261, 402
Easements, Law of, by R. B. Mitchell, 2nd Edition	188
Evidence,—Powell's Principles and Practice of the Law of, 7th Edition, by Cutler and Cagney	186
Indian Penal Code, by R. A. Nelson, 2nd Edition	97
Judicial Trustee's Act of 1896, with Notes, by G. J. Wheller ...	98
Meetings,—Law of, by G. Blackwell	152
Mercantile Law,—Elements of, by T. M. Stevens, 2nd Edition ...	98
Presidency Small Cause Courts Act	152
Privy Council Judgments, by Bal Dave Ram Dave	311
Sedition,—Principles of the Law of, by J. Chundri	151
Tudor's Leading Cases on Real Property, 4th Edition, by T. H. Carson and H. B. Bompas	356
Yearly abridgment of Reports for 1897, by A. T. Murray ...	188

• VAKEEL, HIGH COURT BHOWANIPUR.
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HINDU LAW—ADOPTION OF AN ONLY SON.

The validity of the adoption of an only son is one of the points in Hindu Law on which there is a conflict of opinion between the different High Courts in India. There has been a course of decisions in Madras extending over nearly a century in favour of the validity of the adoption.* The High Court of Allahabad has emphatically laid down the same view and has pronounced two Full Bench decisions, *Hanuman Tiwari* v. *Chirai* in I. L. R., 2 A., 164, and *Beni Prasad* v. *Hardai Bibi* in I. L. R., 14 A., 67.

In Bengal the course of decisions in recent years is certainly the other way. But there has been no decision by a Full Bench in that Presidency. It is only necessary to refer to the two leading decisions both by Division Benches of the High Court: *Raja Upendra Lal Roy* v. *Srimati Rani Prasanna Mayi*, B. L. R. A. C. J., 221, and *Manick Chunder Dutt* v. *Bhuggobutty Dossee*, I. L. R., 3 C., 443. In Bombay the later decisions have followed the view taken in Calcutta. The two leading decisions in Bombay are *Lakshmappa* v. *Ramava*, 12 B. H. C. R., 364, and *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova*, I. L. R., 14 B., 249. The latter is a decision by a Full Bench referring to an earlier unreported decision of a Full Bench and proceeding mainly on the ground of *stare decisis*. The decision of the Full Bench in *Beni Prasad* v. *Hardai Bibi* is by far the ablest and most learned decision upon the point and contains an exhaustive review of all the previous decisions. We do not propose to examine the case-law on the subject, but

* *Vide* Mayne, Ss. 133, 134 and 135 and the cases of *Veera Perumall* v. *Narrain Pillay*, Strange's notes of cases 91, 125; *Arunachallum* v. *Iyasami*, 1 M. decisions 154; *Chinna Gounden* v. *Kumara Gounden*, 1 M. H. C. R., 54; Regular appeal 70 of 1882, Madras High Court; *Narayanasawmy* v. *Kuppusawmy*, I. L. R., 11 M., 43; *Sri Balusu Gurulingaswami* v. *Sri Balusu Rama Lakshmamma*, I. L. R., 18 M., 53.

shall confine ourselves to an examination of the Sanskrit texts and endeavour to ascertain what the correct view is with reference to these texts :—

The texts of *Hindu Law* bearing upon the subject of adoption and more especially upon the adoption of an only son are extremely few. We give below the texts that are of any importance or relevancy :—

I. अपुत्रेण सुतः कार्यो यादृक् तादृक् प्रयत्नतः ।
पिण्डोदक क्रियाहेतोः नामसङ्कीर्त्तनाय च ॥

Manu quoted in the Dattaka Mimamsa.

II. शुक्रशोणितसंभवः पुत्रो मातापितृनिमित्तकः तस्य प्रदानविक्रयपरित्यागेषु मातापितरौ प्रभवतः

नत्वेकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा स हि सन्तानाय पूर्वेषां नतु स्त्री पुत्रं दद्यात् प्रतिगृह्णीयाद्वान्यत्रानुज्ञानाद्भर्तुः ॥ Vasishta.

III. नैकपुत्रेण कर्तव्यं पुत्रदानं कदाचन ।
बहुपुत्रेण कर्त्तव्यं पुत्रदानं प्रयत्नतः ॥ Saunaka.

IV. अपुत्रेणैव कर्त्तव्यः पुत्रप्रतिनिधिः सदा ।
पिण्डोदकक्रियाहेतोर्यस्मात् तस्मात् प्रयत्नतः ॥ Atri.

V. माता भर्त्रनुज्ञया प्रोषिते प्रेते वा भर्त्तरि तत्पिता वा उभाभ्यां वा सवर्णाय यस्मै दीयते स तस्य दत्तकः पुत्रः यथाह मनुः

माता पितावा दद्यातां यमद्भिः पुत्रमापदि ।
सदृशं प्रीतिसंयुक्तम् ज्ञेयो दत्रिमः सुतः ॥ Manu IX. 168.

आपद्ग्रहणात् अनापदि = देयो दातुरयं प्रतिषेधः तथा एकः पुत्रोनदेयः नत्वेकं पुत्रं दद्यात्प्रतिगृह्णीयाद्वेति वसिष्ठस्मरणात् तथा अनेकपुत्रसद्भावेऽपि ज्येष्ठो नदेयः ज्येष्ठेन जातमात्रेण पुत्रीभवति मानवः इति तस्यैव पुत्रकार्यकरणे मुख्यत्वात्. Mitakshara, ch. I. S. 11, pl. 9 to 12.

LP2258

I. By a sonless person should some kind of son be anxiously made for the sake of funeral oblations, libations of water and obsequial rites, as well as the celebrity of his name—cited as a text of Manu in the Dattaka Mimamsa.

II. Man formed of *uterine* blood and virile seed proceeds from his mother and his father (as an effect) from its cause. (Therefore) the father and the mother have power to give, to sell and abandon their (son). But let him not give or receive (in adoption) an only son. For he (must remain) to continue the line of the ancestors. Let a woman neither give nor receive a son except with her husband's permission—Vasishta, Chapter 15, verses 6 to 10.

III. By a man having an only son the gift of a son should never be made. By a man having several sons the gift of a son should be made with effort.—Saunaka.

IV. By a sonless person only should a substitute of a son be always anxiously made for the sake of funeral oblation, libations of water and obsequial rites—Atri.

V. He who is given by his mother with her husband's permission while her husband is absent, or after husband's decease or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his *dattaka* son. Thus Manu says: "He who is equal (by caste) and whom his mother or father affectionately gives (confirming the gift) with (a libation of) water in times of distress (to a man) as his son must be considered as an adopted son." By specifying distress it is intimated that the son should not be given, unless there be distress. This prohibition regards the giver. So an only son should not be given, for Vasishta ordains, "Let no man give or accept an only son"; nor though many sons exist, should an eldest son be given; for he chiefly fulfills the office of a son, as is shown in the following text: "By the eldest son as soon as born, a man becomes the father of male issue."—Mitakshara, Chapter 1, section 11, placita 9 to 12.

The whole controversy upon the subject of adoption of an only son turns upon the principles to be deduced from these texts, and upon the weight to be attached to the interpretation of these texts by the authors of the Dattaka Mimamsa and the Dattaka Chandrika. The question has been thoroughly discussed by the late MR. V. N. MANDLIK in his Hindu Law, pages 496 to 508, and by MR. GOLAP CHANDRA SIRKAR SASTRI in his Tagore Lectures on

Adoption, pages 283 *et seq.*, and by BHATTACHARJEE in his Commentaries on Hindu Law, 2nd Edition, pages 172 to 182. The first two writers contend in favour of the validity of the adoption of an only son, while the other contends for the opposite view. The views of MR. MANDLIK have been approved and adopted by the Full Bench of the Allahabad High Court. MR. BHATTACHARJEE discusses the question from the point of view of Hindu exegetics and that, no doubt, is the correct method of approaching the question. See *Beni Prasad* v. *Hardai Bibi*, I. L. R., 14 A., pages 70 to 72. We are prepared to show that, even according to the most approved principles of interpretation laid down by Jaimini in his Purva Mimamsa, the view taken by MR. BHATTACHARJEE is not correct. But, before stating our arguments based upon the Hindu canons of interpretation, we may be allowed to refer briefly to some of the arguments that find favour with our courts.

1. With regard to the text of Saunaka, it is obvious that the latter half of the sloka cannot be regarded as imperative. No court has ever laid it down as an imperative duty that a man having many sons should give them in adoption. It is reasonable to hold that when the author uses the same word *karthavya* (should be done) in the first part of the sloka, he intends it to be taken in the same sense.

2. The absence of any penalty in the shape of *prayaschittam* (or expiatory rites) in the case of a person who makes a gift of an only son suggests that it cannot be imperative.

3. There are other texts of Saunaka on the subject of adoption quoted in MR. MANDLIK'S Vyavahara Mayuka, Part I, page 40, and summarised in page 498 of his book. The second and third rules given in these texts have been held to be only directory. It has been held that a Brahmin is not bound to adopt from amongst his *sapindas*. The language of the prohibition, however, is exactly the same. With regard to the fourth rule that an adoption should be made from among the respective castes and not from elsewhere, it has been stated that such an adopted son is entitled only to maintenance, but that the adoption stands.(1) The fact that there is no such penalty attached to the adoption of an only son shows that it is purely recommendatory.

(1) Dattaka Mimamsa, page 18, lines 17 to 20, Calcutta edition. Stokes' Hindu Law Books, page 571.

4. Notwithstanding the alleged imperative character of the prohibition, the author of the Dattaka Mimamsa has allowed an exception to the rule in the case of a *Dvyamushyayana* son.(1) If the adoption of an only son by an uncle is permitted, because there is no fear of extinction of lineage, it must follow that an only son may be given in adoption, whenever there is no such fear. The parents may avert the extinction of their lineage by begetting another son or adopting a son, or they may secure their salvation by one of the numerous ways prescribed for discharging the debt to the manes.(2)

5. Mr. Mandlik has cited several instances from the Vedas and Puranas of the adoption of an only son. It may also be pointed out that there is no text declaring that the adoption of an only son, if it has taken place, is invalid.

6. It has been nowhere laid down that an only son taken in adoption is disqualified for inheritance.

We shall now proceed to state the principles of interpretation to be applied to the solution of the question according to the Purva Mimamsa.

7. In deciding whether a precept of the Sastras is directory or mandatory, the principal test to be applied is whether the advantage or disadvantage to flow from the observance or non-observance of the precept is one of an obvious or visible (in Sanskrit, *drishta*) character or not. If the advantage or disadvantage is obvious, there is no reason for suggesting or presuming any advantage or disadvantage that is not of an obvious character, *i.e.*, a spiritual or invisible advantage or disadvantage. Where there is no obvious reason for a precept, it is the duty of a person who has to construe the text to assume that there must have been some reason for the precept, though it may not be obvious to him. The reason which is thus ascribed for the rule is that some advantage or disadvantage of a spiritual character must follow the violation of the precept. The spiritual result which is thus supposed to ensue is called by Sanskrit writers "*Adrishtaphalam*" (*literally* an invisible result). Where the consequence is not visible or obvious, and an invisible consequence has to be attributed, it is held that non-compliance

(1) See Stokes's Hindu Law Books, pages 554 & 555.

(2) See Mandlik, pages 456 & 457.

must detract from the spiritual or religious character of the act and must render it invalid. If, on the other hand, the consequence of a violation of the precept is visible or obvious, it is the only result which flows from the violation, and it is regarded as not affecting the essence of the transaction. At first sight, this principle may appear strange to English ears, but an illustration will make it clear. In prescribing the qualifications of persons for marriage, Manu has the following:—

(4) "Having bathed with the permission of his teacher and performed according to the rule the *Samavarthana* (the rite on returning home) a twice-born man shall marry a wife of equal caste who is endowed with auspicious (bodily) marks.

(5) A (damsel) who is neither a *sapinda* on the mother's side nor belongs to the same family on the father's side is recommended to twice-born men for wedlock and conjugal union.

(6) In connecting himself with a wife, let him carefully avoid the ten following families, be they ever so great or rich in kine, horses, sheep, grain or (other) property.

(7) (*Viz*) one which neglects the sacred rites, one in which no male children (are born), one in which the Veda is not studied, one (the members of) which have thick hair on the body, those which are subject to hemorrhoids, phthisis, *weakness of digestion*, epilepsy or white and black leprosy.

(8) Let him not marry a maiden (with) reddish (hair), nor one who has a redundant member, nor one who is sickly, nor one either with no hair (on the body) or too much, nor one who is garrulous or has red (eyes).

(9) Nor one named after a constellation, a tree, or a river, nor one bearing the name of a low caste, or of a mountain, nor one named after a bird, a snake, or a slave, nor one whose name inspires terror.

(10) Let him wed a female free from bodily defects, who has an agreeable name, the (graceful) gait of a *hamsa* (swan) or of an elephant, a moderate (quantity of) hair on the body and on the head, small teeth and soft limbs.

(11) But a prudent man should not marry (a maiden) who has no brother, nor one whose father is not known through fear, lest (in the former case she be made) an appointed daughter (and in the latter) lest (he should commit) sin.

(12) For the first marriage of twice-born men (wives of equal caste are recommended, but for those who through desire proceed (to marry again), the following females, (chosen) according to the direct order (of the castes) are most approved."(1)

The question to be considered is whether the absence of any of these qualifications would render the marriage null and void, and if so, what the qualifications thus regarded as essential are and how they are to be distinguished from the unessential qualifications. It may be taken as settled that, both according to the commentators and our courts, except the qualifications relating to consanguinity and prohibited degrees laid down in verse 5, none of the other qualifications is essential. It is noteworthy that the language of verse 5 is not the language of command and that the language of verses 4, 6, 7, 8, 9, 10 and 11 is imperative. This shows that Hindu writers do not determine the imperativeness or otherwise of a precept merely by reference to the grammatical form. Can it be said that marriage with a sickly or garrulous girl is null and void, because a man is commanded not to marry her? The answer to these questions is furnished by the commentators in the commentary to verse 11. We shall refer on this point to the commentary of Kulluka Bhatta, the commentator best known to English writers and to the commentary of Medhathithi, the oldest and most celebrated commentator on Manu.(2) This is what Medhathithi says on the point in his commentary on verse 11. "In this chapter (or in this context), where the prohibition does not refer to any (advantage or disadvantage) that is *visible* (or *obvious*) as in the sloka relating to one who is not a *sapinda,* in the event of a transgression of the rule, the very essence of marriage is wanting, or there is no marriage at all. Hence marriage with a person who is related as a *sagotra,* &c., even if it has taken place, is to be regarded as null and void owing to the violation of the rule, as marriage, like *Adhana* (the kindling of the sacred fire) is based upon the texts of the Sastras.

(1) See Manu, Ch. 3, verses 4 to 12.

(2) See Dr. Jolly's Hindu Law, pages 9 & 10.

As in the ceremony of *Adhana*, in the event of any portion being omitted from ignorance, the sacred fires called *Ahavaniya*, &c., cannot be held to be generated, so also in the case of the marriage of a girl belonging to the same *gotra*, &c., the status of a wife does not arise. Though she might have gone through the form of the marriage sacrament, she is directed to be abandoned. The venerable Vasishta and others have also laid down a *prayaschittam* for a marriage of that kind Though the act (or ceremony) may be *incomplete* owing to the violation of a negative injunction which forms part of it (the ceremony), there is no real blame attaching to the man. Still the *prayaschittam* is expressly ordained by a text. Or, intercourse with a woman of the same *gotra* being forbidden, the *prayaschittam* which has been prescribed may apply to any attempt at such intercourse. The prohibition of families that have neglected sacred rites, &c., being based on *obvious* reasons, the marriage is *complete* (notwithstanding the violation of the prohibition), and the girl married becomes the wife, and she is not to be abandoned; and hence it is that the objections in regard to great families, &c., are dealt with separately from the preceding prohibition and enumerated for the purpose of censure. The practice of virtuous men is in accordance with what has been stated. Men sometimes marry girls with reddish hair but never a *sagotra*."

KULLUKA BHATTA says in this connection: "If a marriage takes place with a girl who is a *sagotra* or with a girl who is a *sapinda* of the mother, the status of wife does not arise, as the word *bharya* like the word *āhavaniya*, &c., implies a sacrament, as the abandonment of such a girl is prescribed by the text that if a man marries a *sagotra* girl from ignorance, he should maintain her like a mother, and as there is a *prayaschittam* prescribed for marriage with a *sagotra*. Whatever injunctions, positive or negative, have their origin in some advantage or disadvantage that is *obvious* or *visible*, as in reference to a family that has neglected sacred rites, (verse 7) the status of wife is not prevented from arising by a violation of that injunction. Hence it is that Manu has separately grouped together the disqualifications mentioned in verse 6. The prohibition relating to girls bearing the names of stars, trees and rivers, &c., which is treated in the middle, does not also prevent the status of a wife from arising; but in consequence of the transgres-

sion of the Sastra, there is merely a *prayaschittam* (to be performed)."

There are injunctions of a similar kind in regard to marriage laid down by Yajnavalkya.(1) MANDLIK's *Hindu Law*, pages 167 and 168. The author of the Mitakshara in commenting on the first hemistich of sloka 53 says "the status of wife does not arise in marriage with girls who are *sapindas* or belong to the same *gotra* or *pravara*. In marriage with girls who are suffering from incurable disease, &c., while the status of wife is created, there is merely the practical inconvenience of disregarding an obvious disadvantage."

The principle of construction which we have thus mentioned and illustrated above is laid down by Jaimini in his Purva Mimamsa I, (iii), 4.(2) The same subject is also dealt with by the great Madhava Charya in his Jaiminia-Nyaya-Mala in Adhyaya I, Pada iii, Adhikarana 3. The literal translation of the aphorism of Jaimini is "From the indication of a reason."(3) The title of the Adhikarana in Madhava's book is *Drishta-moolaka-smriti-appramanyam*, *i.e.*, the non-obligatory character of *smriti* texts which have their origin in *Drishtam*, *i.e.*, visible or obvious considerations. The illustration of this principle given by Madhava Charya is drawn from the text of the *smriti* that the *Adhvaryu* or sacrificial priest takes the cloth prescribed in the *Visarjana homa*. The question considered is whether the text is obligatory. It is first argued that there being no text of the *sruti* contrary to this text, this text must be assumed to be binding and that a text of the *sruti* should be implied or assumed. It is one of the fundamental principles of construing *smritis* that if they are not supported by an express text of the *sruti*, a text must be assumed to have existed and lost through forgetfulness or otherwise. But this assumption is necessary only when there is no reason assigned by the author of the *smriti*. The respect due to a Smriti writer obliges us to assume that if he has not given a reason for a rule, he must have found the reason in some text of the *sruti* not now extant; but if some reason is given by the *smriti* writer for his rule, it is a sufficient recommendation for the rule and in the absence of any Vedic

(1) Yajnavalkya, Book 1, verses 52 to 55.

(2) See Mimamsa Darsana Jivananda's Edn., pages 73 and 74.

(3) See Anandasrama Series, vol. 24, page 29.

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text, it is unnecessary and improper to assume one. The text about the priest taking the cloth is regarded as having originated merely from the cupidity of the priests and the text is, therefore, regarded as not binding. If, therefore, in a sacrifice the cloth is not given to, or taken by, the priest, the sacrifice is not rendered incomplete on that account. Wherever a *smriti* text is unsupported by an express text of the *sruti* or by a text of the *sruti* implied under circumstances warranting it, the text of the *smriti* is regarded merely as laying down a directory precept.

To apply this rule in the present case, there is an obvious reason given for the prohibition of the adoption of an only son. Vasishta says distinctly that the object of the prohibition is the perpetuation of the giver's lineage. The penalty annexed to the prohibition is merely the loss of the obvious advantage of perpetuation of lineage. No invisible consequence need be attributed and the prohibition may, therefore, be regarded as merely directory. An adoption may have spiritual results, but it does not follow that a prohibition of certain persons as subjects of adoption should also be based on spiritual considerations. An adoption may secure temporal and spiritual advantages, but the prohibition may be made only with the object of averting a temporal or obvious disadvantage.

It is argued by MR. BHATTACHARJEE that there is an analogy between the rules relating to the *yupa* or sacrificial post and an adopted son, and that just as a sacrificial post cannot be made of any other wood than that prescribed, so also an adoption cannot be made of any person other than those prescribed. This argument is founded upon the assumption of an analogy between the two cases which really does not exist. If an adoption were purely the creature of rules of religion, it might be said that an adoption which did not conform to any one of the requirements would be invalid. But neither adoption, nor the power to make or give in adoption can be said to be purely derived from religious injunctions alone. Adoption is at least as much a secular institution as a religious one, and there are obvious reasons for commending it from a wordly point of view.(1) That a man has got a *natural right* to dispose of his son in adoption is expressly laid down in the very passage of Vasishta which contains the prohibition against the adoption of an

(1) See Mayne (5th Edn.) Sec. 95 and the texts quoted therein.

Acc. No.
Date

only son. It is, in fact, one of the incidents of the *patria potestas* which obtained in India as much as in Rome and elsewhere. If a man has a natural right to *give* his son in adoption, it would seem to follow that the natural right of a man to *adopt* must be still more undoubted. The various instances given by MR. MAYNE in section 95 of his book clearly shew that adoption has been practised in various communities from wordly motives. Granting the existence of the natural craving of most men for children and for male children in particular, and the capacity of a person to make a gift of property of which he is the owner, it follows that a sonless person would be naturally inclined to adopt and bring up a son and make him successor to his property. MR. BHATTACHARJEE is right in stating that the correct solution of the question depends upon whether the right to adopt is based on texts or natural rights. If, as we have shown, the right to adopt or give in adoption is a natural right, the foundation for MR. BHATTACHARJEE'S argument admittedly fails.

LP2258

It is then contended by MR. BHATTACHARJEE that the rule about an only son is a *Paryudasa* and not a *Pratishedha* and that it must be, therefore, regarded as imperative. In order to appreciate this contention and deal with it, it is necessary to understand what is meant by *Paryudasa* and *Pratishedha* and why a distinction is drawn between the two. The negative particle in Sanskrit may have two meanings. It may be used to express a prohibition or an exception. A *Pratishedha* is a prohibition or negative injunction. A *Paryudasa* is a negative proposition by way of exception to a positive rule of greater generality. The negative proposition is read with the positive rule and qualifies it. In a *Paryudasa* the negative particle is read not with the verb, but with the subject or the object. An illustration will make this clear. Suppose that there is a general rule that 'a sonless man shall adopt a son' and that there is a negative rule that a man shall not adopt an only son. It is possible to take the negative rule by itself and treat it as a *Pratishedha* or to read it as an exception to the positive rule and construct a single sentence, *viz.*, that a sonless person shall adopt one who is not-an-only-son. The practical difference between the two readings according to the rules of Mimamsa would be this. If we read it as a single sentence as above indicated, the exception becomes part and

parcel of the positive rule requiring adoption and this rule prescribes the adoption only of persons who are not-only-sons. It would, therefore, be held that an only son is unfit for adoption. On the other hand, if you treat the negative rule as a prohibition by itself or a *Pratishedha*, the unfitness of an only son not being indicated in the general positive rule requiring adoption, the question of the mandatory character of the prohibition will remain to be decided by other considerations such as those we have already adverted to above. At first sight it may seem strange that a clause by way of exception should be held to be a stronger prohibition than an express prohibition. But the remarks we have made above must have made the matter clear. The subject of *Paryudasa* is discussed in Madhava's Jaiminiya-Nyaya-Mala, Adhyaya X, Pada VIII, Adhikarana 1 (Anandasrama series, vol. 24, page 599, 600); Jaimini X, (VIII), 1-4. The advantage in treating a clause as a *Paryudasa* is that it enables you to treat that and the positive rule as one sentence and one rule; and economy is a great merit in a Sastra. Another advantage is that if the two sentences were read apart, the positive rule must be held to be incorrect to the extent of the ground covered by the negative clause. Instead of reading the two sentences separately and attributing a partial incorrectness or partial failure of application to the positive general rule, it is preferable and proper to read them together. These are the considerations in favor of viewing a rule as a *Paryudasa*. But these considerations may give way before weightier ones and the Sanskrit writers were never so rash as to lay down that these considerations should in all cases lead us to conclude that a rule is a *Paryudasa*. Whether there are other reasons which tell against the construction of a rule as a *Paryudasa* depends on the circumstances of each case. Now let us take the text of Saunaka first. It is the first hemistich of the text that relates to an only son. This half of the text states that "by a person having an only son, the gift of a son should never be made." The positive general rule to which alone this can be read as a *Paryudasa* must be that 'a father should give his son in adoption.' In the first place there is no such rule in existence compelling a father to give his son in adoption. This of itself is a complete answer to the argument. But assume for the moment that there is such a general rule. What would be the consequence of reading the negative rule as a *Paryudasa*? The resultant rule

which would be expressed in a single sentence would be, a father having more sons than one shall give his son in adoption. If this is the subject, does not the 2nd hemistich becomes mere surplusage ? Surplusage is always to be avoided in the construction of a text.

Let us now take the text of Vasishta. Here the first rule that 'a man shall not give an only son in adoption' cannot be a *Paryudasa* for the reason already mentioned that there is no general rule compelling a man to give his sons in adoption. It is the latter part of the text "A man shall not *take* an only son in adoption" that can be possibly said to be a *Paryudasa*, as it may be alleged that there is a general rule that a sonless person shall take a son in adoption. There is, however, no such general rule laid down obliging a sonless person to adopt. The Dattaka Mimamsa quotes a text of Manu to that effect, but it is not to be found in the editions of Manu now extant. The text of Atri quoted above is intended merely to prevent persons having sons already from taking a son in adoption. The rule which would result from the construction of a single sentence out of the negative rule and the positive rule would be, 'a sonless person shall adopt one who is not-an-only-son.' If this construction is adopted, the whole passage becomes un-grammatical. The reason given by Vasishta is "For *he* is for the perpetuation of lineage." The antecedent of *he is only-son*, but in the unified sentence above constructed, this antecedent cannot be found. You have to pick out this antecedent by breaking up the object in the sentence, a course which is altogether un-grammatical and not permissible.

We shall now state what our own construction of these texts is. These texts of Vasishta that a man shall not give an only son in adoption and that a man shall not take an only son in adoption are only rules of *Pratishedha* or prohibition, framed for the purpose of averting a visible temporal disadvantage, and no more. It must be noted that these texts do not declare the incapacity of an only son to be adopted. If the object of the text was to declare the unfitness of an only son, the purpose would be completely attained by prohibiting either the gift or the acceptance alone. Since what is incapable of being the subject of a gift is incapable of being the subject of acceptance also. But according to our view the separate prohibition of the gift and the acceptance can be easily

explained. It is for the purpose of indicating that blame attaches to the giver and the receiver and not for the purpose of declaring the unfitness of the subject of the gift. It cannot be said that the attachment of blame to the giver necessarily carries with it the attachment of blame to the receiver also. Among Hindus especially the idea is very familiar, that what may be blamable in a receiver is not so as regards the giver and *vice versâ;* and it may be said that this difference in respect of the claim to moral approbation between the giver and the receiver is not foreign to English ideas also. An Englishman, for instance, would certainly not consider it meritorious to beg, while he might consider the gift of alms to be meritorious. On the other hand, numerous instances can be given from the Hindu Sastras of a gift being considered meritorious, while the acceptance is condemned.

In the text of Saunaka, the first half should be treated as a *Pratisheda* and the second half as an *Anuvada* (or mere statement of fact). It would be absurd to hold that it is a *Vidhi* (or obligatory precept) that a man having more sons than one should give his son in adoption. It must, therefore, be held to be only an *Anuvada.* It is argued by Mr. BHATTACHARJEE that if it is open to a man to adopt an only son or not as he pleased, and if the right to adopt exists by nature, no rule of law is required to give such option. But the object of such a rule is not to create an option, but to denote some amount of blame in the act.

The construction we have placed upon the above texts is the one which has been adopted by the author of the Mitakshara in dealing with the subject. The author of the Mitakshara distinctly says that the prohibition in the absence of distress regards the giver alone, thereby implying that it does not affect the taker. Vijnanesvara then says, An only son should not be given.' Vijnanesvara does not prohibit the acceptance of an only son, unless it be said that such a prohibition is implied in the prohibition of the gift. The use of the word '*tatha*' or similarly, shows that in the author's opinion, the prohibition as to an only son stood on the same footing as a prohibition of the gift of a son otherwise than in distress. Just as in the latter case the prohibition relates to the giver only, or even if it is supposed to affect the taker also, *does not affect the validity of the gift,* so also in the case of an only son, the

validity of the gift is not affected, whatever blame may attach to the giver or to the taker. And this view is supported by the Vyavahara-Mayukha. See Mandlik's Hindu Law, page 503.

There is no analogy between the rule prohibiting adoption by a woman without authority from her husband and the rule relating to an only son. In the former case the prohibition is mandatory, for two reasons, (1) that no reason is assigned for the prohibition, and (2) that the reason, if any, to be gathered *ab extra*, being the want of independence in women, it is a question of *capacity*. A defect of capacity to give or to take is a fundamental defect and must necessarily render the gift null and void.

We may notice here a passage in Dattaka Mimamsa which has been the subject of misconstruction owing to the mistranslation of MR. SUTHERLAND. In Dattaka Mimamsa (IV, 4) the author says that the *sin* of extinction of lineage is incurred both by the giver and the taker. What the author means is only that the taker incurs the sin of causing the extinction of the giver's lineage and not that the taker's lineage becomes extinct notwithstanding the adoption. The text of Vasishta merely says, "For he is for the perpetuation of lineage." Vasishta does not say that the taker's lineage becomes extinct. While the giver incurs the sin of extinguishing his own lineage, the taker would be guilty only of abetment of this sin. Again the word used by Nanda Pandita, viz., *Pratyavaya*, which means only sin, has been wrongly rendered by MR. SUTHERLAND into *offence*. This mistranslation, however, has led Judges (including that eminent Judge, the late Dwarkanath Mitter, J., who was a lawyer without Sanskrit) into holding that as regards the taker, the primary object of the adoption fails, as his lineage becomes extinct notwithstanding the adoption. *Raja Upendra Lal Roy* v. *Srimati Rani Prasanna Mayi*. (1 B. L. R., A. C. J. 221).

13. We shall now pass on to the views of recent commentators on Hindu Law. It may at once be stated that Jagannatha, the author of Colebrooke's Digest and Srinatha Bhatta, the author of the Dattakanirnaya, both regard the gift as valid.

The Dattaka Mimamsa and the Dattaka Chandrika are both said to be against the validity of the adoption. Assuming that these works treat the *gift* as invalid, which, as a matter of fact,

they do not, the weight to be attached to the opinions of these writers is discussed at great length in the Allahabad Full Bench case in the judgments of *Edge*, C. J., and *Knox*, J., and in the judgment of *Edge*, C. J., in *Bhagwan Singh* v. *Bhagwan Singh*, I. L. R., 17 Allahabadpage, 294, and is found to be small. Very strong reasons have been adduced by Mr. Golap Chandra Sarkar for holding the Dattaka Chandrika to be a recent forgery. (See his new book on Hindu Law, pages 77 to 79). The views of the Dattaka Mimamsa and the Dattaka Chandrika cannot, after these decisions, be held entitled to weight, except so far as they may be consistent with sound principles of reasoning. See also *Dr. Jolly's Hindu Law*, page 166, and *Bhagwan Singh* v. *Bhagwan Singh*, I. L. R., 17, A. 373. As to the leading decisions in Calcutta and Bombay to which we have referred, they have been thoroughly criticised by, *Edge*, C. J., in the case in 14 Allahabad and it is unnecessary to go over that ground. As to the views of English writers on Hindu Law, they have also been referred to, at length, in the case in 14 Allahabad, and in MANDLIK's Hindu Law, pages 505 to 508. It is only necessary to bear in mind that the views of English writers upon the subject are entitled to no intrinsic authority and except to the extent that their reasoning is correct, their conclusions possess no value.

SUBSTANTIAL JUSTICE—DISCRETION OF COURTS.

It would be a truism to say that the civil courts in their task of dispensing justice are confined to the law; that if a judge's notions of right and wrong or of the justice of a particular dispute conflict with the rule which the law of the country has laid down for the case, he is bound sternly to carry out the mandates of the law, that is, the justice which the courts are to administer should be found within the four corners of the positive law, written or unwritten, and the hardest case is no justification for not enforcing the law. Yet there are many cases where the judges say that in the exercise of their discretion they decline to interfere, because in their opinion there has been no failure of "substantial justice." This is a position so often taken up that we propose to examine it a little minutely. There is no doubt that the court is invested with a large amount of discretion in many cases; there are

some reliefs which the court is not bound to grant in all cases when a particular legal right is infringed. Now what does this mean? Simply this—that the considerations which should determine the granting of such reliefs vary so much, or that it is so difficult to state them in precise language that it is on the whole well not to seek to lay down a hard and fast rule in such cases. It does not mean that in such cases the judge is entitled to neglect or ignore the legal rights of the parties, and to try to find out the moral merits of their quarrel. Thus the granting of specific performance of a contract is discretionary, but nobody imagines that a judge may refuse specific performance because he imagines that it will be hard on the defendant, say, to compel him to part with the property which he agreed to convey, or that the plaintiff may well do without it. The judge is entitled to take into consideration *certain* circumstances which would be no defence to an action for damages for breach of contract. Thus inadequacy of consideration is no ground for refusing damages for breach of a contract, but specific performance may be refused if the inadequacy is so great as to be evidence of fraud, though no fraud may be actually established; or again in consequence of the plaintiff's delay in seeking specific performance, third parties may have acquired rights in the property which makes it just that the plaintiff should no longer be allowed to obtain specific performance. But except the fact that the law is more vague and less capable of precise exposition, there is nothing to distinguish the power of the court to grant specific performance from its power to award damages. Again, take the case of granting injunctions, or attachment of a defendant's property or person before judgment. Nobody doubts that the court is tied down in these cases by the law as much as in the application of the merest cut and dry rules. But there are two classes of cases with reference to which it is often supposed that the court is at liberty to travel beyond the legal rights of the parties, determine which of the combatants before it is the more honest or the more virtuous, and give its decision for the better behaved disputant. We refer first, to the question of costs; secondly, to the question of the exercise by the High Court of its powers of revision.

With regard to 'costs': the law lays down that "the court shall have full power to give and apportion the costs of every application and suit in any matter it thinks fit" . . . . . .

"provided that if the court directs that the costs of any application or suit shall not follow the event, the court shall state its reasons in writing." This is deemed practically to give absolute power to the courts in the matter of costs, and if it is displeased with the successful party for any reason or considers the unsuccessful party deserving of sympathy on any ground, the costs are made not to follow the event. Suppose, for instance, the defendant who succeeds has given false evidence on any material point or produced a false document in support of his claim. This is considered sufficient to deprive him of his costs, or again, if the plaintiff's claim is perfectly valid in law, but the judge considers it an unkind claim or an improper one according to the accepted code of morality, or if the defendant's defence is perfectly good in law but not according to ethics, such as the plea of limitation, or an objection to the form of the suit, the party having the law on his side is considered not entitled to costs. In fact, the award of costs against a party is considered as the infliction of a punishment on him. In reality, of course the right to costs is based on the right to compensation for damage suffered by the conduct of an opponent in unlawfully withholding a legal right, or unlawfully launching a suit to enforce an untrue or unsuitable claim. In other words, it is compensation for the loss sustained in conducting the litigation which loss is unlawfully caused by the other side when the claim or the defence of the opponent is found to be untenable. Hence the rule that, ordinarily, the costs should follow the event, for, the event shows *primâ facie* that the successful party was right in his claim or defence and his antagonist was wrong in putting him to the expense of establishing it in court. Does it not then follow that he should not be deprived of his costs except when the litigation was unnecessary or when in consequence of false contentions raised by him, he put his opponent to unnecessary expense, so that on a fair assessment of the costs which each side is entitled to get from the other, it would be proper not to make an award in favour of either side? When a plaintiff establishes a portion of his claim, but fails to prove his right to the remainder, the proper course ordinarily would be to award to him the costs on the part with respect to which he has succeeded and to make him pay the costs on the part to which his claim has been found untenable. But it may be found that even with regard to what he succeeded in proving, a great portion of the costs was unnecessarily

incurred or that he made the defendant incur unnecessary costs, and it may be right in such cases to disallow costs altogether. But the matter for investigation always should be not whether either party has acted properly or improperly from a moral point of view, but who has the law on his side, and who was the cause of the costs being incurred improperly. If any party has given false evidence, the criminal law can make him suffer for it. We have emphasised this, because the true principle is often completely overlooked even by judges. In *Kalee Pershad Shaha* v. *Ram Pershad Shaha,* 18 W. R., p. 14, *Kemp* and *Glover,* J.J., held that the successful plaintiff was not entitled to costs because he had acted with malice and malevolence. The true principle was laid down in *Huxley* v. *West London Extension Railway Company,* L. R., 14 A. C. p. 26, which was a case under order LXV Rule 1. The rule enacts that "where any action, cause or matter is tried with a jury, the costs shall follow the event unless the judge by whom such action, cause, matter or issue is tried, or the court shall *for good cause* otherwise order. The question was what was good cause within the meaning of the rule. *Lord Halsbury,* the Lord Chancellor observed, "Whatever may be involved in that discretion, I cannot entertain a doubt that everything which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation is perfectly good cause for depriving the plaintiff of his costs." *Lord Watson* said, "But I do not think that any and every reason which may be assigned for disallowing the costs of a successful party must necessarily be accepted as 'good cause' within the meaning of the rule. I shall not attempt a complete definition of what is meant by these words. They at all events embrace in my opinion everything for which the party is responsible connected with the institution or conduct of the suit and calculated to occasion unnecessary litigation and expense. So long as the judge or court deals with considerations of *that* kind, the sufficiency or insufficiency of these considerations as affording a reason for disallowing costs are matters of which they are constituted sole arbiters." Mark again the exposition of the rule by *Lord Bramwell*: "Now this is not a case in which there were costs of issues—that is to say, no issue was framed for the defendants that I know of; that is no specific determinate issue, but a great many of the things

which the plaintiff affirmed were found for the defendants. There is, however, no rule under which the learned judge who tried the case could say 'the defendants shall get the costs that they have been put to by unfounded allegations and statements and attempts at proof and the plaintiff shall get the costs of those upon which he has succeeded.' But the rule by giving discretion to the judge has enabled him to do substantial justice so that while he could not say 'I will apportion the costs according to the actual findings,' he could still say, 'the plaintiff shall get more and I quite agree as I have said with my noble and learned friend opposite, that if ever there was a case in which there was good cause, this is such a case according to the opinion which the noble and learned Lord who tried the case had of it.' In *Wilmott v. Barber*, 17 Ch. D., 772, the principle has been tersely indicated by *Jessel M. R.* "The Judge has a large discretion as to costs. He may make the defendant pay the costs of some of the issues in which he failed, although he may have succeeded on the whole action. Or he may say that both parties are wrong, but that he could not apportion the blame in a definite proportion and, therefore, would dismiss the claim without costs." It is quite clear from these extracts the question of costs is one entirely between the parties; the matter for determination is, which of the litigating parties is in the right with regard to the merits of the case; he is entitled to his costs unless he occasioned unnecessary costs to his opponent by raising untrue or untenable contentions. When such is the case the court will if possible apportion the costs, and if it cannot, it will make such order as on the whole appears to be just. But improper conduct in the course of the litigation should not affect the right of a party to costs unless such conduct has occasioned unnecessary costs to the opponent.

We now proceed to make a few observations on the second question—namely, the exercise by the High Court of its powers of revision either under S. 622 of the Code of Civil Procedure or under S. 25 of the Provincial Small Cause Courts' Act. The latter section lays down that "the High Court for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, *may* call for the case and pass such order with respect thereto as it thinks fit." The word used is no doubt, 'may' and the jurisdiction is discre-

tionary. The object is that the High Court should satisfy itself that a particular decree or order is in accordance with *law*. Suppose a party to a suit points out to the High Court that a decree is manifestly erroneous in law. Can it refuse to interfere? A mere error of procedure or any other irregularity not affecting the merits of the case would be no ground for invoking the Court's interference on the principle embodied in S. 578 of the Code of Civil Procedure and S. 167 of the Evidence Act. But suppose it is an undoubted error of *substantive* law. Can the Court say that it will not interfere, because it thinks the party asking for its aid has a very unjust case. Suppose for instance a Court of Small Causes wrongly holds that the plaintiff's claim is not barred by limitation, is it a ground for non-interference that the plea of limitation is an improper and unjust one? We submit not. The court is bound to interfere when there is an error of law. It has no discretion where the decision is erroneous according to the *substance of* the law, and the mistake is not one merely of form or procedure. The word *may* is used only to show that mere formal or unsubstantial errors are not a ground for revision. One would think there could be no doubt on the point since the Legislature has expressly declared that the object of the provision is to enable the court to see that the decision is in accordance with *law.* But though there is no reported ruling on the subject, the Madras High Court has repeatedly refused to exercise its power under the section, on the ground that the claim or the defence is extortionate or unjust, or because in its opinion the finding of the lower Court on the facts was also wrong, and there has, therefore, been a compensation of errors. We cannot but respectfully protest against this refusal of the judges to administer the law in order to advance what they regard as the moral justice of the particular case. Suppose, for instance—we are putting an actual case—the High Court refuses to interfere with the decision of a judge who refuses to award interest at the rate agreed upon between the parties on the ground that it is usurious, what would be the result? What is there to prevent all Small Cause Courts from deliberately refusing to administer the law of contracts with regard to interest, or to allow defendants to escape the performance of their obligations by pleading the statute of limitations, or in fact from refusing to give effect to any law which they regard as unjust? So long as their notions of justice agree with that of the High Court, is the law to be set at nought? Is there then to be one law for Small Causes, and another for regular

causes? No one, we believe, would advocate this. But this is not the only evil of judges trying to administer their own justice instead of the justice of the law When a judge sets himself to find out the *justice* of a case, he ends by discovering and enforcing one phase of it only and thereby often perpetrating great injustice, as very often all the facts necessary to elucidate the whole truth of a case are not placed before the court: indeed the court itself shuts out a great deal on the ground that it is not relevant. Then again, the attempt to discover truth behind the law is often made by a revisional tribunal very hurriedly and results in failure. Moreover, any hesitancy in enforcing the law is likely to promote unnecessary litigation by encouraging parties to put forward untenable contentions in the hope that what they regard as the truth of the case may be allowed to triumph over the harshness of the law. We think, there can be no more manly or safer course than to unflinchingly give effect to the law and to leave it to the Legislature to improve it when it needs alteration. No judge is concerned with substantial justice except according to the law. The responsibility for the law is not on the judge, but if he undertake to discover the truth beyond the extent that the law enables him to do, then it seems to us he is undertaking an awful responsibility full of danger with nothing certain to guide him.

TRANSLATED FROM THE VIVADARATNAKARA.

CHAPTER XVI.

Division among different kinds of sons.

Manu says "But where, after the daughter had been appointed to raise offspring, a son is born, the division in that case shall be equal; for there is no right of primogeniture for women."(1) *Commentary*—'Son' means '*aurasa* son.' The word '*Anu*' means 'after the appointment of the daughter.' 'Woman,' *i.e.*, the appointed daughter has been declared by Manu in the chapter on the nature of sons in the texts beginning with '*Aputronena.*'

Brihaspati says "One alone, namely, the *aurasa* son is declared to be the owner of the father's wealth. An appointed daughter is proclaimed equal to him; but other sons shall only be maintained."(2)

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(1) Manu, Chap. IX, 134. (2) Brihaspati, Chap. XXV, 35.

Manu says "One alone, the *aurasa* son, is the owner of the paternal wealth. Let him give to others maintenance out of charity."(1) *Commentary*—'Others' here refers to all those who are excluded from sharing in it. To them maintenance should be given out of charity.

The same author says, "Where a son is begotten by the younger brother upon the elder brother's wife, the division shall be equal. This is settled law."(2) *Commentary*—Where a son is begotten upon the wife of the elder brother, undivided and sonless, by the younger authorized in this behalf, that son after the father's death, when dividing the wealth with his paternal uncle, his own procreator, takes an equal share; but not the additional share claimable on the seniority of his father. This is the meaning.

The same author gives the reason of the law in the following text:—"A substitute does not in law become equal to the principal; the father is the principal in procreation. He should therefore be given his share accordingly"(3) *Commentary*—'*Upasarjanam*' means 'secondary.' The *kshetraja* son cannot in law be equal to the primary or *aurasa* son. Therefore, according to Prakāsakāra the paternal uncle, the procreator, is the principal. Lakshmīdhara however says that the word '*upasarjana*' (secondary) is used for the noun *upasarjanatvam* (nature of being secondary). But in effect there is no difference. '*Dharmēna*' means 'according to law.'

The same author says "He who takes the wealth and the wife of the deceased brother shall, having begotten a son upon her for his brother, give him all his father's wealth."(4) *Commentary*—He who takes the wealth and the wife of his divided sonless, and deceased brother, shall, after begetting upon her a son according to the law of procreation, a *kshetraja* son, give to that son alone all his father's wealth and shall not out of avarice take his brother's wealth himself. This is the meaning.

The same author says "But if an *aurasa* and a *kshetraja* son claim property in the hands of the same person (their mother), each shall take what belonged to his father to the exclusion of the

(1) Manu, Chap. IX, 163. (2) Manu, Chap. IX, 120.
(3) Manu, Chap. IX, 121. (4) Manu, Chap. IX, 146.

other."(1) *Commentary*—The *kshetraja* here contemplated is one born of a person not authorized. 'What belonged to his father' means 'wealth given by his father to his mother for the procreation of offspring.' Others say without difficulty that each takes the wealth of him who was his father.

The same author says "To sons of different fathers, the allotment of shares is by the fathers. Each takes his own paternal wealth and none other."(2) *Commentary*—'Sons of different fathers' means 'sons begotten upon the same woman by different men.' When during treatment of diseases, or by friendship begun during treatment for diseases, a *kshetraja* son is born and an *aurasa* is born after removal of the malady by treatment, then is the *kshetraja* entitled to maintenance merely or a share? And if he is entitled to share, how is the division to be made?

On this point Manu says, "The *aurasa* making a partition with the *kshetraja* shall give the latter a sixth or a fifth share of the father's wealth."(3) *Commentary*—This alternative of giving a fifth or a sixth share has to be regulated, according as the *kshetraja* son is possessed of good qualities or otherwise.

So again Manu says, "The *aurasa* and the *kshetraja* sons are heirs to the paternal wealth. The other ten (kinds of sons) are in their order heirs to the property of men of the same *gotra*."(4). *Commentary*—The first half of the verse is a declaration of the rule already propounded. The other ten, the adopted son, etc., in their order, in default of those previously mentioned, are heirs to the wealth of the *gnatis*. So says Asahayacharya. 'Are heirs to the property' means 'take shares in the father's wealth.' This rule applies, in the absence of the *aurasa*, to the appointed daughter and the *kshetraja* son.

Vasishtha regarding the son says, "If when he is taken, an *aurasa* son is born, he takes a fourth share if the wealth had not been spent in auspicious ceremonies."(5) *Commentary*—'When he is taken' means 'when a son not *aurasa* is accepted as such.'

(1) Manu, Chap. IX, 191.

(2) Not found in the Institutes of Manu in the S. B. E. Series.

(3) Manu, Chap. IX, 164.

(4) Manu, Chap. IX, 165.

(5) Vasishtha, Chap. XV, 9 and 10,

'*Yadisyath*' means 'if there be much wealth.' '*Auspicious* ceremonies,' such as sacrifices, etc.

Katyayana says : "If an *aurasa* son is born, other sons born of wives equal in caste shall take a third share; but if born of wives unequal in caste, they receive only food and raiment."(1) *Commentary*—The meaning is that where an *aurasa* son is born, the adopted son and the rest, if born of wives equal in caste, take a third share. Here to the son taken a fourth share was previously ordained; but by this text, a third share is ordained. This inequality should be construed in the light of the possession of bad or good qualities by the son. From this text it also follows that the injunction to give maintenance laid down by Manu in the text beginning with '*Seshānām*' applies to the sons born of wives unequal in caste.

On this point, Brihaspati says: "The *kshetraja* and other sons take one-fifth, one-sixth and one-seventh shares."(2) *Commentary*—The meaning is that the *kshetraja*, the *kanina* and the *paunarbhava* sons take a fifth, a sixth and a seventh share respectively.

Hārīta says: "When the property is divided, let a twenty-first share be given to a *kanina* son; a twentieth to a *paunarbhava*; a nineteenth to the *amushyayana*; an eighteenth to a *kshetraja*; a seventeenth to the son of an appointed daughter and the rest to the *aurasa* son."(3) *Commentary*—'*Amushyayana*' means 'the son of concealed birth.' '*Itaran*' means 'the remaining sixteen shares.'

Brahma Purana says: "The *aurasa* son, though the last born, shall enjoy the whole estate. The *kshetraja* son shall enjoy a third of the estate; and a son of an appointed daughter, a fourth. The adopted son takes a fifth; the son of concealed birth, a sixth; the son rejected, a seventh; the son of a maiden, an eighth; the son of a pregnant bride, a ninth; the son bought, a tenth; the son by a twice-married woman, the next share (the eleventh); the son self-given, a twelfth; the son by a Sudra woman takes for his share, a thirteenth of the paternal wealth."(4) *Commentary*—The sixth share allowed by Brihaspati to the *kanina*, the twentieth share allowed by Harita to the same, and the eighth share allowed by

(1) Cole. Dig., Vol. II, 348, CCXVIII. (2) Brihaspati, Chap. XXV, 39.
(3) Cole. Dig., Vol. II, 349, CCXIX. (4) Cole. Dig., Vol. II, 344, CCCXVII.

this text to the same must be reconciled as referring to the *kanina* son according as he is excellent in good qualities, totally devoid of them or middling. The seventh share allowed by Brihaspati to a *paunarbhava*, the eleventh share allowed by the Brahma Purana to the same and the twentieth share allowed by Harita to the same must be reconciled as referring to the *paunarbhava* according as he is excellent in good qualities, middling or devoid altogether of them. So also in respect of the *kshetraja* son and the son of concealed birth. Here when the doubt is what any one of the thirteen kinds of sons gets from the father, the Brahma Purana solves it. The text of Harita speaks of the mode of division among six kinds of sons. The text of Sankha and Likhita also speaks of the mode of division among six kinds of sons, equal in caste, whose father is deceased. As regards them, the former applies where the other five are inferior in qualities to the *aurasa* and the latter where they are equal in good qualities to the *aurasa*.

Sankha and Likhita say: "To the eldest, an ass shall be given as an additional share. The whole wealth belongs in default of him to the *kshetraja* son and the son of the appointed daughter; in default of them also, to the next three; in default of these even, to the sons by wives equal in caste, not entitled to share." (1) *Commentary*—Even among sons not heirs, the next succeeding takes the wealth in default of the preceding kinds of sons.

Again the authors say: "The son rejected, the son of the pregnant bride, the son adopted, the son bought, the son by the Sudra wife and the son self-given are the six kinds of sons who are not heirs."(2) The injunctions of different sages allowing different shares to these must be reconciled as being allowed in consideration of their excellence in, total want of and possession of, good qualities.

Sankha and Likhita say: "The following is the rule of division among the six sons who are sharers—the *aurasa* son, the *kshetraja* son, the son of the appointed daughter, the son of a twice-married woman, the son of a maiden and the son of concealed birth are the six kinds of sons who are kinsmen and heirs and of the same *gotra* with the father and the paternal grandfather; they are *sapindas*

(1) Not found in Cole. Dig.

(2) Cole. Dig., Vol. II, 331, CLXXXVI.

and heirs to wealth. The wealth should be divided into ten shares; the father shall take two, the *aurasa* son, two; the *kshetraja* and the son of an appointed daughter together, three; and each of the rest, one."(1) *Commentary*—'*Vikalpah*' means 'determination of shares.' '*Bandhudayadah*' means 'sharers in *gotra, pinda* and water and wealth.' This is what is explained by '*pitrupitamahadinam,*' etc. The drift is this—"When the common property is divided into ten shares, two are declared to go to the father; two, to the *aurasa*; and one and a half each to the *kshetraja* and the son of the appointed daughter; one share each alone should be given to the son by the twice-married woman, to the son of the maiden and to the son of concealed birth. This is for maintenance; and this rule applies where one has all these six kinds of sons."

Gautama says: "The *aurasa* son, the *kshetraja* son, the adopted son, the son rejected, the son made, and the son of concealed birth are heirs. The son of the maiden, the son of the pregnant bride, the son of the twice-married woman, the son of the appointed daughter, the son self-given and the son bought are of the same *gotra*; and in default of the *aurasa* and the other sons, take a fourth share."(2) *Commentary*—'They are of the same *gotra*' means 'they are eligible for offering *pinda*, libations of water, etc., and doing other rites and are, therefore, so described.' The statement that the son of a maiden and the rest belong to the same *gotra* alone is made for the purpose of reminding that where there are any of the sons, *aurasa*, etc., they do not take a share. They take a fourth share, in default of the *aurasa* son and the rest and if their father is alive. If their father be not alive and there are no *aurasa* or other sons, they all certainly take the wealth. This fourth share is allowed them when they are possessed of good qualities. The text of Brahma Purana applies where they are devoid of good qualities. Thus there is no conflict. The recognition in the text of Sankha and Likhita of the *paunarbhava* and the *kanina* as heirs and the denial of their heirship in this text of Gautama should be reconciled as based upon the equality or inequality of castes; for Katyayana says that sons born of wives unequal in caste are entitled only to food and raiment. Similarly

(1) Cole. Dig., Vol. II, 331, CLXXXVI.

(2) Gautama, Chap. XXVIII, 32, 33 and 34.

the denial of Sankha and Likhita of heirship in the rejected son and the adopted son and the inclusion by Gautama of these among heirs should be understood to apply to different cases.

Having defined the *sahodha*, the *dattaka*, the *kreeta*, the *swayamupagata*, the *apaviddha* and the *sudraputra* and having the *aurasa* and other sons in view, Vasishtha says: "Where of the previously mentioned classes (*aurasa*, etc.,) no heir exists, these take his (the deceased's) wealth."(1)

Harita says: "Six kinds of sons are *bandhus* and heirs, viz., the son begotten by oneself upon one's own virtuous wife, the *kshetraja*, the son by a twice-married woman, the son of a maiden, the son of an appointed daughter and the son of concealed birth. The adopted son, the son bought, the son rejected, the son of the pregnant bride, the son self-given *and the son found* are neither *bandhus* nor heirs."(2) *Commentary*—They are *bandhus* and heirs, because they are of the same *gotra*. Lakshmidhara, however, says that they are called '*bandhudayadah*,' because they take the wealth of the *bandhus*. The drift, however, so far as the importance of the first six and the unimportance of the second six are concerned, is the same.

Manu says: "Of the twelve kinds of sons which a man may have according to Swayambhuva Manu, six are *bandhus* and heirs; and the other six, *bandhus* but not heirs. The *aurasa* son, the *kshetraja* son, the adopted son, the son made, the son of concealed birth and the son rejected, are the six who are *bandhus* and heirs. The son of the maiden, the son of the pregnant bride, the son bought, the son by a twice-married woman, the son self-given, the son by a Sudra woman, these six are not heirs but *bandhus*."(3)

Baudhayana says: "Sages declare as heirs the *aurasa* son, the son of the appointed daughter, the *kshetraja* son, the adopted son, the son made, the son of concealed birth and the son rejected. Sages declare as belonging to the same *gotra* with the father, the son of the maiden, the son of the pregnant bride, the son bought, the son by a twice-married woman, the son self-given and the son by a Sudra woman."(4)

(1) Vasishtha, Chap. XVII, 31. (2) Cole. Dig., Vol. II, 331, CLXXXVII.
(3) Manu, Chap. IX, 158, 159 and 160. (4) Baudhayana, II, 2, 3, 31, and 32.

Devala, speaking of the twelve other kinds of sons excluding the son by a Sudra woman, says: "These twelve kinds of sons, born of himself, of another and accidentally found are declared for the purpose of progeny. The first six of them are heirs to all kinsmen; and the rest, only to the father. There is also a preference in their superiority according to their order. All sons are declared heirs to one who has no *aurasa* son. Where there is the *aurasa* son, there is no superiority among these. Of these, sons born of wives equal in caste take a third share and the rest who are inferior in caste shall depend upon him, being provided with food and raiment."(1)

Vishnu having defined the *aurasa* son, the *kshetraja,* the son of the appointed daughter, the son by a twice-married woman, the son of a maiden, the son of concealed birth, the son of the pregnant bride, the adopted son, the son bought, the son self-given, the son rejected and the son of unknown birth, says: "Of these, the one preceding is superior to all succeeding. He alone takes the wealth and he shall support the rest."(2)

Narada says: "The *aurasa,* the *kshetraja,* the son of the appointed daughter, the son of the maiden, the son of concealed birth likewise, the son by a twice-married woman, the son rejected, the adopted son, the son bought, the son made, and the son self-given are the twelve kinds of sons declared. Of these, six are *bandhus* and heirs; and the other six are *bandhus* but not heirs. The one preceding is superior to all succeeding; and the one succeeding is inferior to all preceding. When the father is dead, these have claims upon his wealth in their order. In the absence of the superior, the inferior son takes it."(3)

Yajnavalkya having defined the *aurasa* son, the son of the appointed daughter, the *kshetraja* son, the son of the maiden, the son by a twice-married woman, the adopted son, the son bought, the son made, the son self-given, the son of the pregnant bride and the son rejected, says: "Of these, in the absence of all preceding, the next in order gives the *pinda* and takes the wealth."(4) *Commentary*—These texts according to one of

(1) Cole. Dig., Vol. II, 332, CXC.
(2) Vishnu, Chap. XV, 28, 29 and 30.
(3) Narada, Chap. XIII, 45, 46, 47 and 49.
(4) Yajnavalkya, Chap. II, 132.

which a particular kind of son is declared to be both a *bandhu* and an heir and according to another of which the same person is declared neither a *bandhu* nor an heir, should be reconciled as having reference to the possession of good qualities and the want of them, as the case may be, of that kind of son. And the change of order in the enumeration of the different kinds as affecting their relative superiority must also be understood as based upon the possession of good qualities by the prior-mentioned and the want of them by the subsequent kind of sons. Similarly, in other matters also, the texts must be reconciled on the same line of reasoning.

Manu says: "Not the brothers, not the parents but the sons are declared heirs."(1)

Again he says: "In the absence of the superior kind of sons, the inferior shall take the wealth. Where there are many sons equal, they all share the wealth."(2) *Commentary*—'Equal' either in the possession of good qualities or in the incidents thereof.

Sankha and Likhita says: "In the absence of the superior kind of son, the inferior takes the wealth."(3) *Commentary*—'In the absence of,' etc., means 'in default of the *aurasa* son, etc.' 'Inferior son' means '*kshetraja*, etc."

Brihaspati says: "The adopted son, the son rejected, the son bought, the son made, the son by a Sudra woman likewise; these are declared middling sons, if pure in caste and deed. The *kshetraja* son is held in contempt by virtuous men; so also the son by a twice-married woman, the son of a maiden, the son of the pregnant bride and the son of concealed birth."(4)

Hārīta says: "The son by a Sudra woman, the son self-given, the son bought; all these are Sudra sons and are without doubt *khandaprishthah*. He who abandons his own family and goes into another undoubtedly becomes a *khandaprishthah* by that bad conduct. He who is made a son in distress, he who is self-given and the son of a Sudra woman, all these have been declared by Manu

(1) Manu, Chap. IX, 185.
(2) Manu, Chap. IX, 184.
(3) Not found in Cole. Dig.
(4) Brihaspati, Chap. XXV, 41.

to be *khandaprishthah*."(1) *Commentary*—'*Vaishnavi*' means 'a Sudra woman.'

Here ends the chapter on "Partition among different kinds of sons."

CHAPTER XVII.

On the Aurasa Son.

Vasishtha says: "Twelve kinds of sons only are recognized by the Puranas. A son begotten by one's self upon one's legally wedded wife is the first called *aurasa*."(2)

Vishnu says: "Now, there are twelve kinds of sons. One begotten by a man upon his own wife is the eldest."(3)

Manu says: "The son begotten by one upon his own legally wedded wife is known as the *aurasa* son, the first in rank."(4)

Devala says: "The son begotten by one upon his own legally wedded wife is called the *aurasa* son chiefly sustaining the father's lineage."(5)

Yājnavalkya says: "The son of the body is one produced by a lawfully wedded wife."(6)

Āpastamba says: "The sons of men who approach in due season their wives equal in class, legally married, and not previously married to another are concerned with religious rites and shall never be excluded from inheritance."(7) *Commentary*—'*Apūrvam*' means 'who had not had another husband and who had not been so much as betrothed to another.' This is Prakāsakāra's view. '*Sastra Vihitam*' means 'married according to the injunctions in the Sastras.' 'Religious rites,' *i.e.*, agnihotra, etc. '*Dāyenavyathikramah*' means 'they shall have all the heritable wealth.'

Baudhāyana says: "The son begotten by a man upon his wife equal in class and legally married should be known as the *aurasa* son. They quote the following verse: 'He proceeds from the

(1) Not found in Cole. Dig.
(2) Vasishtha, Chap. XVII, 12 and 13.
(3) Vishnu, Chap. XV, 1 and 2.
(4) Manu, Chap. IX, 166.
(5) Cole. Dig., Vol. II, 334, CXCV.
(6) Yajnavalkya, Chap. 11, 128.
(7) Apastamba, II, 6, 13, 1 and 2.

several limbs of the body. Thou art born of the heart. Thyself, become thy son. Live a hundred years.' "(1) *Commentary*—'Equal in class,' *i.e.*, the twiceborn to the twiceborn, the Sudra to the Sudra, and not Brahmin to Brahmin, Kshatriya to Kshatriya; for otherwise the son of the Kshatriya woman legally married by the Brahmin will not be included among the twelve kinds of sons. So says Pārijāta.

Sankha and Likhita say: 'Let a Brahmin take the hand of a woman equal in class; the bodies of his forefathers are born again of her; let him figuratively address his own soul in the person of his son. So it is said 'He proceeds from the several limbs, etc.,' "Ancestors seize the infant fetus produced from blood. Thou, my soul, art born again that thou mayest here sleep in body. For the benefits conferred on parents, thou, my soul, art called son; because thou deliverest them from hell called *Put* thou art called *putra* (son)."(2)

Here ends the chapter on 'The *aurasa* son.'

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

The Maharaja of Bhartpur *v.* Kachera, I. L. R., 19 A., 510. The question was whether an independent prince could sue in British India by a recognized agent other than one appointed under S. 472. We must confess that the decision of the learned Judges is rather against the grammatical interpretation of the section. It may be, however, difficult to suggest a reason why a person appointed under S. 432 should be the only kind of recognized agent entitled to sue.

Ghazi *v.* Sukru, I. L. R., 19 A., 515. In an article by Mr. P. S. Sivaswami Aiyar in 1 M. L. J., on *Venkatacharyalu* v. *Rangacharyalu*, I. L. R., 14 M., 316, the reasoning on which that decision was based was strongly criticised. The Allahabad Judges in this case have followed that decision. We have nothing to add to the very cogent arguments advanced in that article questioning the correctness of the *ratio decidendi* in *Venkatacharyalu* v. *Rangacharyalu*. Except upon the ground that a gift by the lawful guardian is not a necessary pre-requisite of a valid marriage, it appears to us difficult to support the decision. To talk of

(1) Baudhayana, II, 2, 3, 14.

(2) Cole. Dig., Vol. II, 334, CXCVII, 335, CXCVIII.

the mother as *a* legal guardian, when *the* legal guardian is somebody else, appears to us erroneous. It cannot make any distinction, whether the giver in marriage would in certain contingencies be competent to fill the roll of guardian or that under no circumstances, he may have that competency.

Imam Khan v. Ayub Khan, I. L. R., 19 A., 517. We are unable to regard this decision as a correct exposition of explanation ii to S. 13 of the Code of Civil Procedure. A person having sued to recover property as owner and failed, sued again for possession of the property as mortgagee. *Knox* and *Burkitt*, J.J., dismissed the suit on the ground that the plaintiff might and ought to have made this a ground of action in the former suit. S. 13 refers to a person litigating under the same title; and explanation ii does not take away the force of this qualification in the section. And the title as mortgagee is distinct from the title as owner. Even giving the decision of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttun Kœr*, 19 I. A., 234, the fullest scope, it is difficult to suppose that the plaintiff *ought* to have made the claim as mortgagee a ground of attack in the former suit. It would certainly have been embarrassing to the plaintiff, first to adduce evidence that he was the owner, and next that somebody else was the owner and gave him a good title under a mortgage.

Mahabir Prasad v. Sital Singh, I. L. R., 19 A., 520. It is always a question of difficulty to construe a provision of the Transfer of Property Act. After a preliminary decree in a suit for sale upon a mortgage is passed and the time provided for payment has expired, the order absolute for sale or final decree is directed to be made. It stands to reason that an application for execution within 3 years from the date of the order absolute is within time. The difficulty, however, arises with regard to the application for the order absolute. Is that an application for execution? It was held to be so in *Mahomed* v. *Ganapati*, I. L. R., 13 A., 278. If that be so, and such an application presupposes the existence of a decree, the subsequent application for sale must be within 3 years of this application. If the application for an order absolute is an application for execution, does it come under Art. 178 or 179? If until the order absolute is made the suit is regarded as a pending suit, then neither of the articles can apply. And the result of this will be that an application for the order absolute may be made at any time after the date of the conditional decree. The whole confusion is the result of importing the English rules relating to mortgages and mortgage decrees without a study of the Civil Procedure of this country and a careful attempt to make the one fit in with the other.

Dip Narain Singh *v.* **Hira Singh**, I. L. R., 19 A., 527. The first of two mortgagees obtains a mortgage decree without joining the second as a party, and purchases the property himself. The second mortgagee who was not impleaded is of course entitled to redeem. The question is what must he pay. Is it the amount of the mortgage calculated with interest up to the date of redemption or the amount of the purchase-money, or whichever is the larger of the two sums. Treating the second mortgage as outstanding, it is clear that in the first mortgagee have merged his interest as first mortgagee and the equity of redemption after the second mortgage. He is, therefore, entitled to be paid the amount of the mortgage up to the date of sale If the purchase-money is larger than that amount, although he may not be entitled to it as mortgagee, he will have an outstanding interest as purchaser in respect of the difference of the two amounts.

Modhu Sudan Singh *v.* **Rooke**, I. L. R., 25 C., 1. This decision of the Privy Council is of very considerable importance. The rule is laid down by the Privy Council that an alienation by a Hindu widow without justifiable necessity is only voidable, and not void. This sounds rather a startling announcement. The decisions have hitherto proceeded upon the ground that if justifiable necessity could not be shown, the alienation was void altogether; and the provision of the Limitation Act providing 12 years for a suit by a reversioner to recover property alienated by a widow appears to be based upon the view that the alienation is void. If it was only voidable, it follows, as a matter of course, that where the alienation is the grant of a lease the acceptance of rent by the reversioner is sufficient ratification of the act of the widow.

Aga Mahomed Jaffer Bindanim *v.* **Koolsom Beebee**, I. L. R., 25 C., 9. This is a valuable decision of the Privy Council dealing with several questions of Mahomedan Law. The Privy Council has held that the transfer of deposit receipts of a bank is not sufficient to constitute a gift. It would not be a sufficient *donatio mortis causa* under the English Law. A commission of 3 per cent. payable to the executor was held not to be a debt, but only a legacy to come out of the one-third disposable by will by a Mahomedan. Their Lordships also held that a Mahomedan widow is not entitled to maintenance. That she is not entitled if governed by the Shia law to a share in the value of land forming the site of buildings has been decided in several cases and has been reaffirmed by the Privy Council.

Shama Churn Mitter *v.* **Wooma Churn Haldar**, I. L. R., 25 C. 36. *Bannerji* and *Stevens*, J.J., lay down the salutary principle that

a notice to quit is not bad, because of some error in the statement of the area of the land. It would be a great advantage if a similar principle were extended to a tender of a pattah, under the Rent Recovery Act of this Presidency. An error, however small, is regarded as sufficient to vitiate the tender, and when after the error is pointed out a fresh pattah is tendered, it becomes generally too late for the fasli, and the non-tender of a correct pattah within the fasli is fatal to an action for rent. We thought Mr. Bhashyam Aiyangar's Bill would remedy this serious defect, but we have heard nothing of it since Mr. Crole's memorable speech last year.

Ram Narain Joshy *v.* Parmeswar Narain Mahta, I. L. R., 25 C. 39. It is rather hard, though we have no doubt it is correct law, that where a suit is instituted or an appeal presented in a Court which has no jurisdiction and it is transferred to a tribunal which would have jurisdiction if the suit or appeal was first presented to it, that it should be dismissed for want of jurisdiction. It would be well if a provision were introduced in the Suits Valuation Act or a proviso to S. 25, C. P. C., to cure the defect. The rule of law is more especially hard, because the provisions according to which the value for the purpose of jurisdiction has to be determined are not always simple and intelligible.

Ram Narain Singh *v.* Mina Koery, I. L. R., 25 C. 46. The court of higher grade is the court authorized to sell under S. 285, C. P. C., where two courts attach the same property. But if the court of inferior grade sells without objection or having overruled it, the purchaser gets a good title notwithstanding. This seems to us the only proper interpretation of S. 285. To give it wider scope would be to defeat justice. See however I. L. R., 22 B. 88.

Gour Mohun Gouli *v.* Dino Nath Karmokar, I. L. R., 25 C. 49. This was a suit by a person professing to be the real owner against a *benami* purchaser of a decree for a declaration that he alone was entitled to it. The benamidar had apparently attempted to execute the decree prior to the suit. The question whether a suit will lie at all in respect of a decree where the benamidar had been allowed to execute the decree was the subject of decision in *Sethurayar* v. *Shunmugam Pillai*, 7. M. L. J., 279. There is no doubt some difficulty in permitting such a suit. If the plaintiff is given the declaration, he will have to apply to the executing court to be allowed to execute the decree. He cannot apply as the transferee of the benamidar. He applies as a real transferee from the original decree-holder. The Court having recognized somebody else in respect of the same transfer as entitled to execute is called upon

again to adjudicate in favor of another as the real transferee. But once a person is allowed to execute the decree as transferee, there is no procedure prescribed for taking him off the record except upon a transfer by him. By a fiction of law it may be, that the real transferee may be regarded as taking by operation of law from the benamidar just as the administrator may be supposed to take from the executor.

SUMMARY OF RECENT CASES.

Decree modified on appeal—Prior proceedings, use of.

Hazrat Amir Begam, *v.* Nawab Mir Nurudin Husenkhan. In a suit for division of property, when a decree is modified on appeal so as to vary the shares of the parties, a fresh application for execution should be filed, the Court executing the decree being at liberty to make use of, as far as possible, all the prior proceedings taken in the execution matter :—*Bombay Printed Judgments.*

Adoption by Hindu widow of her brother's son.

Bai Nani *v.* Chunilal Jeshankar. The texts of Saunaka and Sakala expressly lay down among negative prohibitions, the cases of the daughter's son, the sister's son and the son of the mother's sister, as ineligible for adoption in the case of the three higher castes of Hindu society, but their scope cannot be enlarged by analogical reasoning so as to include the adoption by a woman of her brother's son among the prohibitions. All that is required is that marriage shall be possible between the person for whom the adoption is made and the natural mother of the adopted boy. When, therefore, the younger of two Hindu widows adopted her brother's son for the purpose of continuing the line of her husband, who could have contracted a valid marriage with the boy's natural mother: *Held*, that the widow acted under an implied authority from her husband and the adoption was valid. *Held* also, that it would be a very far fetched construction of the law which would permit the husband or the elder widow to make a valid adoption of the boy, while denying this same validity to the act of the younger widow solely because the boy's natural father happened to be her brother :—*Bombay Printed Judgments*

Narayan Ganesh Joshi *v.* Ramachandra Vishnu Joshi. Defendant entered into the management of a Hindu shrine and into possession of the Inam property thereto belonging, under a deed of gift

executed in his favour by his natural cousin the late manager, in pursuance of which the Collector transferred the khata of the Inam lands to him and the Kamat Adhikaris duly recognized the defendant as the manager of the shrine under them. Plaintiff, sister's son of the late manager and his nearest, *bandhu*, heir according to Hindu law, sought to recover possession of the management of the temple, and possession of its lands, and to oust the defendant.

Held that as plaintiff could give no evidence in support of his claim, except that he was sister's son of the late manager and had not proved that the management of the shrine was hereditary, or that an heir, such as he, was entitled to succeed to it, plaintiff had not shown a better title than defendant, and had not disproved the defendant's right to be considered the manager of the property, or established his own right to displace the defendant:—*Bombay Printed Judgments.*

S. 3 (4) *of the Indian Stamp Act,* I *of* 1879—*Penalty Amendment of decree.*

Adarji Dorabji Ghaswala *v.* Rajaram Jhurakhanlal Kalal.

A document described as a kararnama was executed by defendant in favour of plaintiff, whereby defendant agreed in consideration of plaintiff performing certain services for defendant which would eventuate in defendant obtaining from Government a remission of a portion of the price which he had paid to Government for a toddy contract in which he had suffered loss, to pay to plaintiff out of the sum that might be so remitted by Government, 3 annas on every rupee remitted. The document was stamped as an agreement with an 8-anna stamp though attested by a witness, and the amount remitted by Government was larger than that covered by the stamp, if the document was to be treated as a bond. In a suit to recover the amount due under the document, the Subordinate Judge admitted the so-called kararnama in evidence but refusing to receive the deficient stamp duty and penalty passed a decree for Rs. 100 only, the amount covered by the 8 annas stamp.

Held that the instrument sued on was a bond within the definition of that term in Section 3 (4) of the Indian Stamp Act, 1879.

Held also, Candy, J., dissenting:—that as the parties when the document was executed were evidently under a mistake, thinking it was a mere agreement and should be stamped as such, and under such mistake, stamped it with 8 annas which secures a sum of Rs. 100 only

though the document was intended to secure a far greater amount, that the Court of first instance should have treated the instrument as an insufficiently stamped instrument and allowed the deficient duty and penalty to be paid upon the same under the provisions of section 34 of the Indian Stamp Act, and that the High Court had power to do in appeal what the lower Court could have done, *viz.*, allow the plaintiff to pay the deficient duty and penalty and decree to him three annas on every rupee remitted by Government:—*Bombay Printed Judgments.*

Absence of Pleader—Pleader instructing other pleaders to appear—Restoration of suit to file.

Balwantrao Ganesh Oze v. The Secretary of State for India in Council. A pleader being engaged in another Court instructed two other pleaders to appear for him before the District Court in a suit in which he was appointed pleader by the plaintiff. Though the pleaders appeared, the Court dismissed the suit for want of appearance of plaintiff or any one duly authorized in his behalf. The District Judge having rejected the plaintiff's application for the restoration of the suit, the High Court in appeal directed the suit to be restored to the file:—*Bombay Printed Judgments.*

Practice—Discovery—Bankers' Books Evidence Act, 1879.

Pollock v. Garle [1893, I. Ch., D. 1., C. A.]

The plaintiff agreed to purchase a certain number of shares belonging to the defendant in a particular company. The suit was to rescind the contract and for damages, the ground of action being that the defendant by various misrepresentations and in particular, by a false statement that the company had at the time of the contract a large balance in the hands of its bankers induced the plaintiff to enter into the contract. After filing the suit the plaintiff applied for and obtained an order for inspection of the bankers' books, such inspection being limited to shewing the balance of the company in the books of the bankers at the time of the contract. The defendant appealed and the appellate Court discharged the order. Their Lordships of the Court of Appeal held that S. 7 of the Bankers' Books Evidence Act, 1879, ought to be so construed as to be consistent with the principles of law relating to discovery and that courts ought to allow inspection of only such of the entries in a banker's account which is in form or in substance the account of a party to the litigation. So that when an account is the account of a

person who has nothing to do with the litigation in question, the court ought to look to the effect of such an order upon the interests of third parties and take care that the section is not made a means of oppression.

Married woman—Restraint on anticipation—Wife's position in English law with respect to her husband's creditors—44 *and* 45 *Vict.*, Ch. 41, S. 39.

Paget v. **Paget** [1898, I. Ch., D. 47, per *Kekewich*, J.]

According to the law of England where a wife pays out of her separate estate the debts of her husband or for that purpose mortgages her separate estate, she is entitled to be exonerated from or indemnified by her husband if living or by his estate if he be dead, for in this respect she stands in the position of a surety to her husband. If, however, the separate estate of the wife is restrained from anticipation, the court has power to relieve her from the restraint under s. 39, 44 and 45 Vict., c. 41. The sole criterion in cases of applications for removal of restraint on anticipation is to see whether the wife's happiness will be seriously endangered by refusal or will be advanced by such order. But when the wife's life interest has been made available for raising money for payment of her husband's debts by means of relief from restraint on anticipation under the sanction of the court, the ordinary doctrine under which she is entitled to be indemnified will not be extended to such payments unless the order of the court itself contains any directions to that effect.

Liability of Government officials in their official capacity—Crown's prerogative—Amendment—Practice—Change of character of suit.

Raleigh v. **Goschen**, [1898, I. Ch., D. 73, *per Romer*, J.]

The plaintiff sued the defendants, who were the Lords Commissioners of Admiralty in their official capacity, for a declaration that the latter were not entitled to enter upon or acquire by compulsory purchase some lands of the plaintiff, for damages for alleged trespass and for injunction to restrain further trespass. *Romer*, J., held that the suit was unsustainable against the defendants in their official capacity and that leave to amend so as to describe the defendants as private individuals ought to be refused inasmuch as such an amendment would change the character of the suit.

The following general principles of law may be gathered from the judgment of *Romer*, J., in this case;—

1. Except as provided by statute, no officer of Government is liable to be sued in his official capacity for anything done in his public character or employment.

2. Any person who commits a trespass cannot escape liability for the offence and cannot prevent himself being sued, merely because he acted in obedience to an order of the executive Government or of any officer of State.

3. If the trespass had been committed by any subordinate official by order of his superior, that superior official,—whatever his official position may be,—could be sued.

4. The head of a Government Department is not liable for the neglect or torts of officials in the Department, unless it can be shown that the act complained of was substantially the act of the head himself.

Will—Revocation by codicil—Principles, governing.

In re **Wilcock.**

Kay v. Dewhirst [1898, I. Ch. D. 95 *per Romer*, J.]

A testator bequeathed his personal estate to his two daughters absolutely and directed that each should be paid £1,000 on their respective days of marriage in addition to their shares of the personalty. By a subsequent codicil he directed that the provisions mentioned in his will with respect to the £1,000, be null and void, and as to the personal estate he directed that "instead of such bequests in the manner expressed in my said will to such daughters absolutely" his executors should convert the whole and stand possessed of the money in trust to pay one-half of the income to one daughter and the other half to the other daughter each for her separate use, and on the decease of either of the daughters to pay one-half of the trust moneys to such child or children of hers as she by deed or will may appoint, and in default of appointment to her children equally. The codicil made no provision as to what was to be done if either of the daughters died without children. The unexpected event happened and one of the daughters died childless leaving a will by which she disposed of her estate upon certain trusts. Under these circumstances, *Romer*, J., had to construe the effect of the codicil on

the will of the testator. Decided cases have established certain rules of construction on the question above stated.

1. Where you have a distinct disposition made by a will, that disposition cannot be revoked by a codicil except by words clear and distinct to that effect. (*Kellet* v. *Kellet*, L. R. 3, H. L. 167).

2. If a testator leave a legacy in absolute terms, but were afterwards to restrict its enjoyment to secure certain objects for the benefit of the legatee, then, upon failure of such objects, the gift absolute prevails (*Lassence* v. *Tierney*, 1 Mac. and G. 561.)

3. Where there is an absolute gift by will and then a codicil not merely modifying the mode of enjoyment by the legatee, but diminishing the estate originally given, then the absolute estate is in effect cut down.

Applying these principles to the facts of the case *Romer*, J., held that so far as the gift of £1,000 was concerned, the codicil revoked the will;

and that in the event that had happened there was no intestacy as to the moiety of the personalty given to the daughter who died, as the codicil did not in effect revoke the will in that behalf.

Practice—Discovery—Penal Proceedings.

The Mayor, &c., of the County Borough of Derby v. Derbyshire County Council [1897, Appeal Cases, p. 550.]

S. 10 of the Rivers Pollution Prevention Act, 1876, makes it an offence to pollute river water and empowers a county court to make an order requiring any person to abstain from committing the offence and also to impose a penalty upon any person disobeying the order. The respondents, plaintiffs, sued the appellants, defendants, in the county court at Derby for an order under this section requiring the latter not allow sewage water to flow into the river Derwent. The plaintiffs then applied for an order of discovery of documents and delivery of interrogatories. The Judge made the order and that was confirmed by the Queen's Bench and by the Court of Appeal. The defendants appealed to the House of Lords. The chief objection of the defendants was that this was a penal proceeding and no discovery ought to have been allowed. The House confirmed the judgment of the Courts below. Lord Herschell who delivered the leading judgment of the House has clearly explained in his judgment those cases where a discovery is generally refused. There are two classes in which discovery is not allowed, *i.e.*, (1) a penal proceeding and (2) cases where the insisting on a discovery of facts may, when the discovery is made, subject the party to a penalty in

some other proceeding. The two classes of cases are distinct from each other and ought not to be confused. The former is either a proceeding to enforce a penalty or one of such a nature that it may—not necessarily must—result in a penalty. It is not enough if it merely lead to a step towards exposing to a penalty, as for instance, in the case on hand where the only order that could have been made was an order requiring the defendant to abstain from polluting the river which order if disobeyed would end in a penalty. The other class relates to the disclosure of particular facts or the giving of particular answers which if disclosed or given tend to expose a penalty. If a person takes objection on this ground, he must either show that the answers to particular questions if given in a particular way might or would subject to a penalty or when the questions are put he must take exception to answering them on that ground. In the particular case, however, the matter had not come to this stage as the appeal had been preferred upon the general order for discovery.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

The Lawrence Asylum Press Almanac for 1898:—Price Rs. 6.

The Indian Penal Code, by R. A. Nelson, Bar.-at-Law, Second Edition, published by *Messrs. Srinivasa Varadachari & Co., Triplicane, Madras*:—Price Rs. 8.

The Elements of Mercantile Law, by T. M. Stevens, D.C.L., Bar.-at-Law, Second Edition, published by *Butterworth and Co., 7, Fleet Street, London*:—Price 10/6.

The Albany Law Journal for January (*in exchange*).

The Calcutta Weekly Notes for January (*in exchange*).

The Allahabad Weekly Notes for January (*in exchange*).

The Green Bag for January (*in exchange*).

The Canadian Law Times for January (*in exchange*).

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What Constitutes Champerty.—The Supreme Court of the United States has recently given a decision in *Peck* v. *Heurich*, 173 Sup. Ct. Rep. 927, upon the interesting point, not often raised, as to what constitutes champerty. In this case, the title to a piece of land was conveyed to the plaintiff as trustee; all costs of obtaining possession of it were to be borne by him; and in the event of its being obtained the trustee was to receive $33\frac{1}{3}$ per cent. of the proceeds "after paying all expenses, costs, and expenditures" out of his share. The decision of the court that this agreement is champertous seems plainly right. According to Black-

stone, 4 Commentaries, 124, and also the later cases, such as *Ry. Co.* v. *Brady*, 57 N. W. Rep. 767 (Neb.), *Land Co.* v. *City of Superior*, 67 N. W. Rep. 38 (Wis.), there are three elements necessary to constitute the offence. First, and this is common to all forms of maintenance, the absence of any other interest in the case on the part of the champertor than that arising from his champertous contract; second, the assumption by the champertor of all expenses in conducting the case; third, a previous agreement for his remuneration from the proceeds of the suit. The present case combines these three elements.

The general ground upon which the legal condemnation of champerty rested, and still rests, is that of public policy. It may be questioned, however, if the common law offence of champerty, as we know it to-day, whether regarded from an historical or from a practical point of view, deserves to be considered as a living part of the law. Historically, the nature of the offence, the evil against which the law is directed, have in large part changed. If the language of the statute of 1 Ed. III, c. 14, and of Hawkins, 1 C. P. 462, S. 38, is to be regarded, it seems that originally the taint of champerty was not due to any feeling that there was evil in the increase of law suits *per se*. It was owing to the fear that the purchasing and conducting of suits "by a great man of the realm" would have a "manifest tendency to oppression." To-day oppression, or illegal influencing of the courts, is out of the question, and the condemnation of champerty arises, as the tone of the case under discussion shows, from the feeling that it is undesirable for the courts to be annoyed by the multiplication of suits brought by persons with no interest of their own.

Admitting, however, that champerty, in its changed modern significance, is still objectionable, of what practical efficacy is the law of champerty as it stands to-day? Owing to the need of combining the three elements above mentioned, the question of whether or not an agreement is to be held champertous seems one of terminology. On the authority of this present case, a contract providing that an attorney is absolutely to receive $33\frac{1}{3}$ per cent. of the gain resulting from the suit is champertous, provided the other two elements be present. An agreement which reads that the attorney shall receive a fee contingent on and proportioned to the amount recovered is free from this taint. *Ramsey* v. *Trent*, 10 B. Mon. (Ky.) 341; *Major* v. *Gibson*, 1 Patt. & H. 48. Such being the case, it would seem that, to an attorney bent upon carrying out an affair of this nature, the law in regard to champerty would prove no great obstacle:—*Harvard Law Review.*

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Damages—Liability for Gratuitous Medical Services.—In an action for personal injuries caused by defendant's negligence, *held,* that the plaintiff can recover for the value of the services of the doctors and nurses, and it is immaterial whether plaintiff will ever have to pay for such services. *Denver & Rio Grande R. R. Co.* v. *Lorentzen,* 79 Fed. Rep. 291.

If the true rule as to such damages is that plaintiff shall recover only for the expense to which he is actually put, this decision is wrong. This was the view taken by the court in *Pepperhorn* v. *Black River Falls,* 61 N. W. Rep. 79 (Wis.). But this is open to the objection that under such a rule the friends of the plaintiff would be treated as giving their services, not to the plaintiff, but to the wrongdoer. The proper view, and the one sustained by the weight of authority, would seem to be that these services have been necessitated by defendant's wrong, and the defendant should pay for them. The plaintiff is the proper person to be paid for them, since they were rendered for him. That they cost him nothing is immaterial. He recovers, not for their cost, but for their value. *Brosnan* v. *Sweetser,* 127 Ind. I.:—*Harvard Law Review.*

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Persons—Infancy—Estoppel.—In an action to foreclose a mortgage, *held* that the defendant was not estopped from denying his infancy, because he had falsely represented himself to be of age and thereby induced the plaintiff to make the contract. *New York Building Loan Banking Co.* v. *Fisher,* 45 N. Y. Supp. 795.

The case is undoubtedly supported by the weight of authority. Bigelow on Estoppel, 5th ed., 605; *Merriam* v. *Cunningham,* 11 Cush. 40; *Alvey* v. *Reed,* 114 Ind. 148; *Burley* v. *Russell,* 10 N. H. 184, accord. *Kilgore* v. *Jordan,* 17 Tex. 341, *contra.* In general, an estoppel would be raised wherever an action of deceit would lie; but even in jurisdictions where such an action against the infant is allowed, (*Fritts* v. *Hall,* 9 N. H. 441,) the courts have not gone so far as to allow the contract to be enforced. Their refusal is grounded upon public policy. The result is that because of the fraud the party should have a right to rescind the contract, and should then be left to an action of tort. 1 Story on Contracts, 5th ed., S. 111:—*Harvard Law Review.*

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Torts—Action for Mutilation of Dead Body.—*Held,* that the father of a child has such a right to its dead body that he may maintain an action against one who, without his consent, performed an autopsy on the dead body. *Burney* v. *Children's Hospital,* 47 N. E. Rep. 401 (Mass.);—*Harvard Law Review.*

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Duty of Carriers ;—In *Taylor* v. *Wabash R. Co.* a somewhat novel question in the law of negligence was raised. The plaintiff sued for damages incurred by reason of a severe illness, due to the cars of defendant, on which he was a passenger, being insufficiently warmed, on the theory that it is the duty of a railroad companyto provide its passengers, not with bare transportation only, but with a vehicle in which they will not be exposed to a temparature so severe as to injure their health. After the evidence was in, the Court instructed the Jury to return a verdict for the defendant. On appeal the Supreme Court, speaking through Mr. *Justice Barclay* said :

" By accepting plaintiff as a passenger upon the train, defendant became obliged to discharge some other duties towards him beyond that of mere safe carriage to the plaintiff's destination. The principles of the common law, as applied to the circumstances of travel at this day and in this country, require of the carrier of passengers by railroad a certain measure of attention which we believe the defendant in this action did not fully meet. To quote a recent writer on this topic: 'The duty of the carrier extends, not only to the furnishing of safe vehicles, but also to the supplying them with such accommodations as are reasonably necessary for the welfare and comfort of his passenger. This duty would undoubtedly include the supplying them with seats, if a day car or vehicle; with proper berths, if a sleeping car; with warmth in cold weather; with light at night," etc. In the case at hand defendant was notified of the plaintiff's suffering from want of proper or insufficient heat in the car. Notwithstanding such notice, repeatedly given, defendant omitted to comply with the demands of its duty, although it appears from the evidence that the train made many stops at stations along the route. Defendant, it may fairly be inferred, had ample opportunity to supply the needed heat, had it seen fit. Such, at least, is the showing of fact which plaintiff makes; and the truth of it he is entitled to have submitted to the proper triers of the facts. The plaintiff's case is not founded on any claim for mere discomfort on his journey. It is founded on the theory that he ultimately suffered a severe illness and impairment of his ability to work, as a direct consequence of the cold he contracted on the ride with defendant of which he complains. His testimony tends to sustain that theory; and he was, we think, entitled to go to the jury upon it ":—*The Albany Law Journal.*

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We take the liberty of extracting the following article from the Albany Law Journal, as it cannot fail to be of interest to a great many of our readers.

Lawyers and Politics.

Should lawyers engage in politics? Before this question can be intelligently answered it is necessary that it be more clearly defined. I presume it goes without saying that lawyers should discharge in politics the obligations resting upon all good citizens. Under our form of government every qualified citizen owes certain duties to the government, and he is recreant to his trust if he seeks to evade this responsibility. It is his duty to endeavor to make the laws under which he lives as perfect as possible to suggest changes and make alterations in them. It is his duty to ferret out crime, and to see that the violators of law suffer the penalties imposed upon them It is his duty to see that the laws are framed so as to shield the innocent and punish the guilty. It is his duty to endeavour to fill the offices with the most competent officials. It is his duty to take an interest in public affairs, to discuss important issues, and to exert his influence in behalf of purity in politics and a wise, just and economical administration of law. To this extent lawyers, in common with all other good citizens, have their political duties to perform. And I think it is safe to go even farther, and assert that the lawyer, by reason of his very profession, should take a more active part in politics than the average citizen. His very vocation opens out before him peculiar opportunities for doing his country political service. In the study and practice of the law he has an opportunity for detecting its defects and suggesting improvements in its form and administration. In his business dealings with all classes and conditions of people he learns who, among those who are candidates for the suffrages of the people, are the most worthy. In representing clients, both in the courts and out of them, he gains their confidence, and thus is enabled to shape their conduct not only in business matters, but in politics also. The duty which a lawyer owes, then, as a citizen, demands of him that he take an interest and part in politics up to a certain point. Nor has he a right to shirk this responsibility. For him to do so because he will be subjected to criticism, lose some clients, make enemies, alienate friends, curtail his profits and injure his popularity, is to act an unworthy and cowardly part. By abstaining from politics entirely he will have more time for his profession, more time to devote to study, more time to consult his clients and discharge his other professional duties. But he has no right to look at it from this selfish standpoint. He owes to

society certain duties, and should endeavour to perform them even at a personal sacrifice of time, leisure and money. Nor should a lawyer refuse to render professional service in the line of political duty. Criminals must be prosecuted no matter how high they may stand in politics. It is a great temptation, at times, to avoid duties of this kind. It is often extremely disagreeable to prosecute those who occupy a prominent place in the political walks of life. In discharging duties of this nature, lawyers often incur the lasting enmity of clients who can pay good fees. By going forward and manfully performing his duty, a lawyer may find himself a target for criticism, an object of abuse and a subject of calumny on the part of every mean and base slanderer. But it matters not how severe the trial; it matters not how disagreeable the task, in matters of this kind every true lawyer will bravely face the danger and fearlessly discharge the duty incumbent upon him.

And now I have brushed away some preliminaries, and I have removed from this discussion certain aspects of my subject about which the great majority of the legal profession, and the public generally, I believe, are agreed.

Should lawyers engage in politics? If they wish to rise to professional eminence, if they wish to make a name for themselves, if they wish to make money, if they wish to be successful in their day and generation—is it wise for them, to use a common, but forcible, expression, to dabble much in politics? Is it wise for them to run for office, to spend much of their time among the people endeavoring to win popularity and public applause—in other words, to devote more time and attention than their duties as citizens impose upon them, to getting into the good graces of the people? Or, to put the question more sharply still, if a lawyer wishes to rise to eminence at the bar, should he devote himself exclusively to his profession, not meddling at all in politics? I dare say the consensus of opinion of the most able and successful lawyers would favor answering this question in the negative. Prof. John B. Minor, who was a professor of law in Virginia's far-famed university, and who as a teacher and expounder of the law, was perhaps unsurpassed on this continent, in lecturing to his classes, strenuously advocated a divorce between the law and politics, and urged upon young men the importance of devoting themselves assiduously and exclusively to their profession. That the law is a jealous mistress is an expression which has so often been repeated as to have become axiomatic. "The profession of the law," says Mr. Ritso, "is that, of all others, which imposes the most extensive obligations upon those who have had the confidence to make choice of it; and, indeed, there is no

other path of life in which the unassumed superiority of individual merit is more conspicuously distinguished according to the respective abilities of the parties. The laurels that grow within these precincts are to be gathered with no vulgar hands; they resist the unhallowed grasp, like the golden branch with which the hero of the Æneid threw upon the adamantine gates that led to Elysium.

It stands to reason that the lawyer who gives all of his time to his profession must, in the long run, outstrip his competitor who divides his time between law and politics. While the latter is out among the people hunting up votes, the former is pouring over the pages of the law. If a lawyer devotes himself, as he should do, to his profession, he has no time for anything else. Every mail brings letters to be answered, every day brings clients whose cases must be looked after, and every court brings cases to be argued. He must be familiar with the fundamental principles of the common and statute law. He must have mastered Blackstone, Kent, Story, Smith's Mercantile Law and Adams'. Equity. He must be familiar with the changes made in the statute law of his own State, and he must know by heart its Constitution. He must keep up with the reports of his own State, and must be pretty familiar with a number of those of other States, and especially with those of the Supreme Court of the United States. And then there are a thousand office duties to be performed. Certainly a lawyer has no time to spare for matters outside of his profession.

The experience of the most successful lawyers proves the same thing. As a general rule, lawyers who have given their energies to their profession have succeeded, while many of those who have attempted to unite law and politics have failed in both. Many a bright young lawyer becoming disgusted with the common-place routine work of his profession, and fretting because he does not at once receive that recognition which he feels that his talents merit, launches out upon the tempestuous sea of politics, only to be stranded upon its rocks. There are two reasons which demand of lawyers now more than ever before this intense devotion to their professional work. In the first place, competition is sharper now than it has ever been. I do not mean simply that the bar is crowded, for that has almost invariably been the case. What I refer to more particularly is this; Formerly lawyers were accustomed to gather around them a line of clients who were attached to them not only professionally, but personally, and who could be depended upon through thick and thin. To a considerable extent this has been changed. Clients do not generally now remain as steadfast and loyal as was once the case. A man may be one attorney's client

to-day, and to-morrow another's. In the rapid press of business and the spirited competition of the times clients will not wait. If they call at the law office and find that the attorney whom they want is out, they will often at once go elsewhere and form a new relationship. If their business interests demand it, they have no compunctions at all in changing from one attorney to another. In the second place, the law in many respects has taken on a business character. In the law offices we find the telephone, a stenographer and typewriter, an office boy, and many other conveniences. Letters must receive immediate attention. Correspondents cannot afford to wait for answers to their letters, and will not do so. Executions and sentences of the court must sometimes be stayed by telegram. One day a lawyer must attend the State court, and on the next he must appear before the United States, District or Circuit Court. At one hour he may be in his own office, advising his clients; at the next he may be in the court-room arguing some intricate case, and the third hour may find him in the consultation room of some attorney in another city many miles distant.

This new attitude which the profession is fast assuming demands of an attorney the rigid application of business rules and regulations, and it is getting to be more and more prohibitive of outside work, it matters not whether it may be "the charms of a light literature" or the fascinations of a political life.

But it may be answered, he may form a partnership and in this way relieve himself from the demands of office work, and, to some extent, of duties in the court-room. While, in a measure, this may alleviate matters, yet it by no means accomplishes all that may be desired. Oftentimes clients call to see if they can obtain the services of a particular member, and, finding that one out, they go elsewhere. Besides it is often the case that one member of a partnership is better qualified for doing a special kind of work than another, and it would be surprising if this were not so.

Of course there are exceptions to all rules. In some individual cases it may be well to mix a little politics with your professional work. I do not think it will hurt a lawyer in the rural districts, especially if he has a partner, to be a member of the legislature. He will not lose a great deal of time from his office. He will widen his acquaintance with the people; he will become acquainted with the prominent men of his State; he will keep up with changes in the laws, and where the legislatures elect judges he will stand a better chance for promotion to the bench. And then there are positions in public life, such as solicitor and

attorney-general, which are in the line of his profession, and which, in place of retarding, will often help him in his professional work, if he can secure them.

And now let us look at this question as we see it exemplified before us. Practically we see lawyers in office on every hand. We find a great many of them in the State legislatures. We find them in the various county offices, in the executive offices of many of the States, and, in fact, we find them filling almost every variety of office in the gift of the people. In the house of representatives and in the senate of the United States we find a long roll of attorneys. Nor is it generally a matter of surprise when we learn that the successful candidate for the presidency is a member of the legal profession. Were you to ask them why they had gone into politics, the answers would be as varied as they would be interesting. Some of them would tell you that politics was more congenial to their tastes than the friction of the court-room and the dry pages of the law. Some would tell you that they were ambitious and liked to hear their praises sung by the multitude. Others, again, would tell you that they got tired waiting for clients to come, and sought public office rather than starve. And others still would tell you that they had engaged in politics against both their inclination and their judgment, because they thought that they were bound to obey the voice of the people. I venture to assert that the great majority of them would say that they regretted ever entering politics; and yet the probability would be that, if it were possible to be done over, they would do the very same thing again. Lawyers have to consult their own peculiar qualifications and tastes. They have to take into consideration their peculiar circumstances and environments. I have no idea that entering politics was a mistake on the part of Clay, Calhoun or Webster. Calhoun was only at the bar for a few years and no doubt acted wisely in selecting a wider field. Clay was a successful lawyer, politician and statesman, even though he failed to reach the goal of his ambition—the presidency. Webster was a great lawyer and a great statesman. For a man with the diversified talents which he possessed to tie himself down to one profession would be a grievous mistake. Abraham Lincoln, Stephen A. Douglas and Daniel W. Voorhees were all successful lawyers as well as politicians. In the cultivated and distinguished Carolinian, Hugh S. Legare, we find the qualities of a lawyer, politician and statesman happily combined. I have no doubt that Judah P. Benjamin, who was a distinguished member of the Confederate cabinet and an ornament first of the American and afterwards of the English bar, would have egregiously erred had he in his own case

divorced politics from the law. Nor have I any doubt that the eloquent statesmen and great Georgia lawyers, Hill, Toombs and Stephens, were inspired to a happy choice when they united politics and the law.

Nor do I believe that either of our ex-presidents, Harrison or Cleveland, made a mistake in entering politics. After a lawyer has attained eminence at the bar, and has secured a comfortable estate, I think it is both wise and commendable in him to branch out into the wider field of politics and statesmanship ;—*The Albany Law Journal.*

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Good Advice to Law Graduates.

The following very excellent advice was given by the Hon. Isaac Newton Phillips, in an address to the law graduates of the Illinois Wesleyan University, at Bloomington: "Don't take life too seriously. Don't go about wearing a countenance of a dyspeptic owl. Cultivate a sense and appreciation of humor, but don't, oh ! don't set up as a professional humorist. It is one of the chief compensations of a practice at the bar that the nervous strain and drudgery are frequently relieved by bursts of humorous light between the shadows. Ludicrous situations arise in the progress of litigation, and if you have not the sense of humor to enjoy them, you will miss that which has in it more solace than large retainers. What a 'balm of hurt minds' is a little innocent fun ! Our great president, Abraham Lincoln, preserved his mental health in the terrible ordeal of the war by indulging his exquisite sense of the ridiculous. I would not have you descend into undignified frivolity, by any means : but there is a false dignity as well as a true one, and you may set it down that one who always wears a grave, solemn and forbidding countenance is carrying around a very large supply of stupidity under the guise of what he supposes to be dignity. A saving sense of humor is a monitor to good taste and propriety, and keeps us out of many errors and follies. When you are done with the work of the day, lock your office door and go home a free man. Don't carry your law-suits about with you for the entertainment of your friends. Never 'talk shop,' even in your own home. Nothing is more intolerable than the lawyer who can talk in society of nothing but 'his quillets, his cases, his tenures, and his tricks,' unless it is the doctor who persists in telling you whose head is just now ringing with his latest dose of quinine.

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"It is a laudable ambition in each of you to desire to become a successful lawyer. That you may abundantly succeed is my sincere

prayer; but I would not have you forget that there are far greater and better things than to be even the most successful lawyer—greater and better things than any riches or worldly honors which may follow professional success. To be true to your convictions, and live always in the good company of your own self-respect, is more than the winning of law suits or the taking of cities. Riches and worldly honors cannot alone make you happy. Though you voyage with Sinbad to the Valley of Diamonds, and though you chafe the lantern of magic with Aladdin until the genii of thrift come and build you palaces in a night, there must still remain a great want in your soul if this be all you have to carry with you down the other side of the hill of life, for when your hair is silvered, and your step uncertain—when your voice can no longer instruct courts or enthral juries—you will recur fondly to those greener spots on memory's waste which signalize the helpful hand and the loving deed, and then the memory of one tear of gratitude on the cheek of the widow or the orphan whose patrimony you have saved without reward will be to you far more than forensic victories or palaces of gold" :—*The Albany Law Journal.*

The Madras Law Journal.

PART II.] FEBRUARY 1898. [VOL. VIII.

SUCCESSION OF COGNATES UNDER THE MITAKSHARA.

I.

The author of the Mitakshara opens section VI of Chapter II by stating that, in default of Gentiles, *i.e., Gotraja Sapindas* and *Samanodakas,* the *Bandhus* or cognate *Sapindas* are heirs and that such *Bandhus* are of three classes—*Atma-bandhus* (one's own cognate kindred), *Pitru-bandhus* (father's cognate kindred or cognate kindred through the father), *Matru-bandhus* (mother's cognate kindred or cognate kindred through the mother)—and cites the following text in support of this classification. :—

"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred."

There are altogether nine cognates specified in the text and divided into three classes, each class consisting of three. A man's (1) father's sister's sons, (2) mother's sister's sons, (3) mother's brother's sons are first named as being his *Atma-bandhus* or his own cognate kindred. His (1) father's father's sister's sons, (2) father's mother's sister's sons, (3) father's mother's brother's sons are then named as being his *Pitru-bandhus* or his father's cognate kindred. His (1) mother's father's sister's sons, (2) mother's mother's sister's sons, and (3) mother's mother's brother's sons are named last as his *Matru-bandhus* or his mother's cognate kindred.

There being nothing in the text itself expressly as to the succession or the relative rights of succession of these three classes of *Bandhus*, the author of the Mitakshara immediately after citing the text, which by some is ascribed to Vriddha Satatapa, by others to Baudhayana, comments upon it in placitum 2 as follows:—"Here by reason of mere affinity, the cognate kindred of the deceased himself are his successors in the first instance, on failure of them his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended." (1)

In each class three are mentioned who are respectively the first cousins of the propositus, of his father and of his mother. The author of the Mitakshara, while expressly stating the order of succession as between the three classes of *Bandhus*, is silent as to the order of succession *inter se* among the members of each class. The probability is that his silence is designed, inasmuch as the enumeration of *Bandhus* comprised in each class is not exhaustive, but illustrative. As already observed until about the time of the decision of the Privy Council(2) (June 1868,) and a Full Bench decision of the *Calcutta High Court* (3) which was delivered about the same time (September 1868,) the notion prevailing in the Indian Courts was that the said enumeration was exhaustive. But it is now the settled law that it is only illustrative and that any person, at any rate a male, who is within the definition of a *Bhinnagotra Sapinda* is entitled to succeed as such.

There may be no small difficulty in framing an exhaustive table of the *Bandhus* or *Bhinnagotra Sapindas* under the Mitakshara Law and in grouping them into the three classes and in settling the order of precedence *inter se* among the members of each class.

Mr. Mayne contrasts the difference between the Mitakshara and the Bengal School in respect of *Bandhus* and points out the radical difference between the two in paras. 461 to 473, 475, 535, 536 and 539. Under the Bengal School the spiritual benefit arising from the offering of oblations to the manes of the deceased's ancestors is the cornerstone of the law of Inheritance. Under the

(1) Stokes's Hindu Law Books, page 449.

(2) *Gridhari Lall Roy* v. *The Bengal Government*, 2 M. I. A., 448.

(3) *Amrita Kumari Debi* v. *Lakshminaryan Chuckerbutty*, 2 B. L. R. F. B., 28.

Mitakshara or Benares School, consanguinity or propinquity is the corner-stone of the law of Inheritance. No doubt in several cases, especially in the case of very close heirs and some of the remoter heirs, the person entitled to succeed by reason of consanguinity will also be the person who will confer the greatest spiritual benefit. Under the former the offering of funeral oblation is the cause of inheritance, and under the latter propinquity is the cause of inheritance, though in doubtful cases the offering of funeral oblations may be evidence of such propinquity.(1) The important thing to be borne in mind is that the author of the Mitakshara emphatically declares that the term heritage (*Daya*) signifies that wealth which becomes the property of another *solely by reason of relation to the owner*, and *he again declares* referring to the *text of Manu*,* "To the nearest *Sapinda* the inheritance next belongs," that the rule of propinquity is the governing principle not only in the case of *Sapindas* but *Samanodakas* and others when they appear to have a claim to the succession. That the conception of the *Sapinda* relationship by the author of the Mitakshara is founded solely upon consanguinity or community of particles of body and not upon the principle of religious efficacy resulting from the offering of funeral oblations is unequivocally declared in an earlier portion of his work, already referred to, which has not been translated by Mr. Colebrooke.

There in his exposition of the theory and definition of *Sapinda*, the author expressly *repudiates* the theory that *Sapindas* are persons connected by exequial *pindas* and maintains that they are consanguineous relations, *i.e.*, kinsmen of the deceased related by consanguinity.(2)

Mr. Colebrooke was unfortunately unaware of this portion of the Mitakshara, and being familiar with the Bengal School of Hindu Law, he naturally translated the word "*Sapinda*" wherever it occurred in the chapter relating to inheritance as persons "connected by funeral oblations." This, no doubt, was the reason why

(1) Mitakshara, ch. I, Sect. 1, § 2. Stokes's Hindu Law Books, page 364.
Tagore Law Lectures for 1880, by Rajkumar Sarvadhikari, pages 626 and 627.
Chapter II, Sect. 3, § 4. Stokes's Hindu Law Books, page 443.

(2) Tagore Law Lectures for 1880, by Rajkumar Sarvadhikari, pages 598 to 601, also Madras Law Journal, vol. I, part II, page 75, *Umaid Bahadur* v. *Udoi Chand*. I. L. R., 6 C., 119, at pp. 126, 127; *Lalubhai Surchand* v. *Bai Amrit*, I. L. R., 2 B., 300, at pp. 426 & 427.

* Manu, chapter IX, verse 187.

in the earlier administration of Hindu Law by British Courts and until light was thrown upon the matter by researches into the untranslated portions of the Mitakshara and some of the principal commentaries thereon, the fundamental notion of Inheritance under the Mitakshara was obscured and more or less lost sight of, and confounded with the Bengal theory of spiritual benefit on which the whole scheme of inheritance is based.(1)

The difference between the two schools produces the greatest divergence in regard to the succession of *Bandhus* or cognate *Sapindas.* Under the Mitakshara system, the cognate kindred with the exception of the daughter's son who is exceptionally brought in next after the daughter do not succeed until after all the agnate *Sapindas* and *Samanodakas* are exhausted. According to the definition, a man's ascendants in an unbroken male line up to the seventh degree and his descendants in an unbroken male line up to the seventh degree, he being included in counting the degrees in either case, are his agnate *Sapindas* in direct ascending and descending lines. The descendants up to the seventh degree in an unbroken male line of each one of such ascendants are his collateral agnate *Sapindas.* His lineal male ancestors beyond the seventh degree up to the fourteenth degree as well as his lineal male descendants below the seventh up to the fourteenth degree as well as the lineal male descendants up to the fourteenth degree of each one of such ascendants beyond the seventh up to the fourteenth degree are his lineal and collateral *Samanodakas* who are also agnates. It will be seen that all these are agnates and must be exhausted before the nearest *Bandhu* or cognate *Sapinda* can come in, except, of course, the daughter's son. According to the principle, already adverted to, of the transmission of corporeal particles to one's descendants, which forms the test of propinquity, such transmission in an unbroken male line among agnates is so efficacious that the most distant *Samanodaka* or an agnate who may be fourteen degrees removed from the propositus, or from the common ancestor of himself and the propositus, is regarded as nearer of kin than the nearest cognate; the reason being that in the latter case the community of corporeal particles is comparatively attenuated by the circumstance that the trans-

(1) Mayne on Hindu Law and Usage, 5th Edition, para. 469.
Tagore Law Lectures for 1883, by Dr. Jolly, page 168.
Lalubhai Surchand v. *Bai Amrit*, I. L. R., 2 B., pp. 430 and 431.

mission of particles through an unbroken male line is interrupted by the intervention of a male of quite a different family and *gotra*, but preserved, though in a comparatively attenuated degree, by such male having married a female descendant of the propositus within seven or five degrees as the case may be, according as the propositus may be in the paternal or maternal line of such descendant, or by his having married a female descendant of a common ancestor of the propositus and such descendant, such common ancestor being within seven or five degrees of the propositus, as the case may be, according as the common ancestor is in the paternal or maternal line of the propositus and such descendant being within seven or five degrees of the common ancestor as the case may be, according as such common ancestor may be in the paternal or in the maternal line of such descendant. Turning now to the Dayabhaga Law, the system of inheritance which is founded on the religious efficacy resulting from the presentation of the funeral oblations to the manes of the ancestors of the deceased is briefly as follows. The *gotraja* or agnate *Sapindas* of the Mitakshara are classed by Jimutavahana, the author of the Dayabhaga, as *Sapindas* and *Sakulyas*, the former being agnates within three degrees or nearer agnate *Sapindas*, the *Sakulyas* being the remoter agnate Sapindas beyond the third degree to the seventh degree. Under the Mitakshara system as already explained, both form one class, none being interposed except the daughter's son. But under the Bengal system the *Bandhus* are interposed both among the nearer agnate *Sapindas* and among the *Sakulyas* or the remoter agnate *Sapindas*; the result is that the *Bandhus* or cognates *are shuffled* in among the agnates instead of, as under the Mitakshara, coming after the agnates including *Samanodakas*(1) and not only do all the cognates come in before any of the *Sakulyas* or *Samanodakas* but the cognates themselves *are shifted in and out* among the nearer agnates, heirs in the female line frequently taking before very near *Sapindas* in the direct male line on the principle of superior religious efficacy.(2)

This system is made quite intelligible if we bear in mind that a Hindu (male) is bound to offer undivided oblations to his father, father's father, and father's father's father; to his mother's

(1) Mayne's Hindu Law and Usage, para. 9, page 8.

(2) Mayne's Hindu Law and Usage, para. 467, page 580.

father, mother's father's father and mother's father's father's father; and divided oblations to his three ancestors in the male line beyond the father's father's father and libations of water to the seven ancestors in the male line beyond the last of those to whom divided oblations are offered.

A deceased Hindu is spiritually benefited by the oblations which are offered to him. He is also benefited by the oblations which though not offered to him are offered to one to whom the deceased in his lifetime was bound to offer. The person who offers oblations confers greater benefit upon the receiver of such oblation than the latter by receiving such oblations confers upon the offerer. In other words the offering of an oblation to any individual constitutes a superior claim to acceptance of an oblation from him or the participation in oblations offered by him to another. The offering of undivided oblations is considered to be of higher spiritual value than the offering of divided ones and the divided oblations are considered to be superior to mere libations of water. Those who offer undivided oblations to both paternal and maternal ancestors are superior to those who offer only to the paternal ancestors.(1) Those who offer undivided oblations to the paternal ancestors of the deceased proprietor are superior to those who offer such oblations to his maternal ancestors only, so much so that one who offers oblations to only one of the paternal ancestors of the deceased is preferred to one who offers to more than one of the maternal ancestors of the deceased. Those who offer oblations of a particular description to a larger number of the deceased's ancestors are preferred to those who offer the same description of oblation to a less number of ancestors in the same line. By applying these principles the table of succession under the Dayabhaga will stand as shown in paras. 462 and 463 of Mayne on Hindu Law and Usage, 5th Edition, and the enumeration of *Bandhus* or cognates and their division into *ex-parte paterna* and *ex-parte materna* will be found exhaustively set forth in two tables, Nos. 1 and 2, appended to paras. 464 and 465 respectively of Mayne on Hindu Law and Usage. A table of succession under the Bengal School will also be found set forth in Tagore Law Lectures for 1883 by Rajkumar Sarvadhikari at page 864.

(1) Mayne's Hindu Law and Usage, para. 467, pp. 579—80.

On the principle of religious efficacy the first cognate who is brought in is the daughter's son and he comes next after the great-grandson, the widow and the daughter being interposed by reason of special texts in their favour and the daughter's son is given priority over such a close agnate as the brother. When we apply the principle of religious efficacy, the reason becomes obvious; the daughter's son offers oblations to the propositus himself and his father and paternal grandfather; the brother offers no oblations to the propositus, but he offers oblations to the very same three paternal and maternal ancestors to whom the deceased during his lifetime was bound to offer; and therefore, the deceased only participates in the said oblations; and owing to the principle already indicated that the offering of any oblation to the deceased constitutes a superior claim to the offering of oblations to the ancestors of the deceased in which the deceased only participates, a daughter's son has priority over a brother. No doubt, under the Mitakshara also the daughter's son has the same priority over a brother. But that is not because of his conferring superior spiritual benefit, but because the author of the Mitakshara interprets the suffix *cha* (also) to the Sanskrit word *Duhitarah* (daughters) as including the "daughter's son."(1)

The next cognate who is brought in after the daughter's son is the sister's son who is placed next after the brother, brother's son and brother's grandson and before the grandfather and other agnates.

Under the Dayabhaga, the daughter's son, the father, the grandfather and the great-grandfather are brought in next after their respective descendants in the male line up to the third degree. Comparing the spiritual benefit conferred by the father's paternal aunt's sons, and that conferred by the maternal uncle the former has superiority over the latter. Both are cognates who offer undivided oblations. The former offers an undivided oblation to one of the paternal ancestors of the propositus, whereas the latter offers undivided oblations to the maternal ancestors of the propositus. Owing to the operation of one of the principles already referred to, *viz.*, that the offering of an undivided oblation to a paternal ancestor is superior to the offering of undivided oblations to a maternal

(1) Mitakshara, ch. II, section II, § 6. Stokes's H. L. B., page 441.

ancestor, the father's paternal aunt's sons are superior to the maternal uncle and his sons under the Dayabhaga School,(1) and both of them will come in before the remoter agnate *Sapindas, Sakulyas* and all *Samanodakas*, whereas under the Mitakshara neither of them will come in until after the *Samanodakas*.

In fact, cognates are divided into two classes, *viz.*, *ex-parte paterna* and *ex-parte materna.* And on the principle of religious efficacy the latter are postponed to the former.(2)

Under the Mitakshara the cognates, who are defined not with reference to religious efficacy but with reference to community of corporeal particles, are divided into three classes as already shown on the principle of the relative propinquity of such classes.

In addition to what has already been pointed out, another serious consequence of the radical difference between the two schools in respect of cognates is that so many as *four* out of the limited number of nine *Bandhus* specifically enumerated in the Mitakshara are not recognized as cognates by the Dayabhaga School for the obvious reason that they cannot possibly satisfy the religious test of Jimutavahana. They are the father's maternal uncle's son, the father's maternal aunt's son, the mother's maternal uncle's son and mother's maternal aunt's son being Nos. 14, 15, 21 and 22 in Mr. Mayne's table of *Bandhus* under the Mitakshara.(3)

It will also be observed that those cognates find no place, in either of Mr. Mayne's tables of *Bandhus* under the Dayabhaga Law, *viz.*, *ex-parte paterna* and *ex-parte materna.*(4)

For the sake of illustration, let us consider the case of the father's maternal uncle's son. The common ancestor of these two (*viz.*, the propositus and his father's maternal uncle's son) is the owner's father's mother's father to whom according to the rule already indicated the owner offers no kind of oblation, though his father's maternal uncle's son offers undivided oblations to such common ancestor being his father's father. But under the Mitakshara definition of *Sapinda* the two are cognate kindred. Nothing there-

(1) Dayabhaga, Ch. XI, Sec. VI, S. 12. Stokes's H. L. B., page 346.

(2) Mayne's Hindu Law and Usage, para. 464.

(3) Mayne's Hindu Law and Usage, page 667.

(4) *Ibid.*, pp. 574 and 577.

fore, is more fallacious and misleading than the application of the Bengal Law in determining under the Mitakshara Law the status of a claimant as a cognate, or his relative position to another cognate. Even if the Mitakshara were obscure or silent on the point, bearing in mind the radical difference between the two schools in regard to cognates, it will be altogether unsafe and dangerous to be guided by the express texts or principles of the Dayabhaga School. But the difficulty will have to be solved as best it can, by relying on the Mitakshara definition and theory of *Sapindaship* and the cardinal principle of propinquity as determining the rule of succession. But when the author of the Mitakshara is express on the point and leaves no room for doubt, not only will an appeal to the Bengal School be unwarranted, but there is not even any necessity for unraveling the large body of unspecified *Bandhus* with reference to the Mitakshara definition of *Sapinda*, and constructing an exhaustive table of cognate kindred and dividing them into three classes on the analogy furnished by the illustrations given in Satatapa's text indicating the relative order of the cognates comprised in each class.

Mr. Mayne no doubt has attempted to construct what apparently purports to be an exhaustive table of *Bandhus* under the Mitakshara system indicating their relative order of precedence. As far as it goes it is in the main correct; but the table is by no means exhaustive either in the descending, ascending or collateral lines, comprising as it does only 27 *Bandhus*, among whom the maternal uncle and his sons rank as Nos. 8 and 9 respectively, and the father's paternal aunt's son ranks as No. 11.(1)

The original definition of *Sapinda* is contained in the chapter relating to marriage and it is that which has to be applied in the matter of inheritance. Mr. Mayne refers to this definition of *Sapinda* in his chapter on Marriage.(2) He there observes that according to that definition 2,121 possible relations are rendered ineligible for marriage. The clue to the said number is to be found in Mandlik's treatise on Hindu Law, Appendix No. 3, page 345; where he treats of *Sapinda* relationship in respect of marriage, impurity and inheritance. It will be remembered that the

(1) Mayne's Hindu Law and Usage, para. 667.
(2) Mayne's Hindu Law and Usage, para. 82.

definition refers to five degrees on the mother's side and seven degrees on the father's side. Hardly has any commentator or author on Hindu Law explained whether the maternal line mentioned in the definition refers to the agnate line of the mother's father alone, or includes the line of his mother also, as well as the mother's mother's paternal and maternal lines extending to the fifth degree from the propositus, and whether the paternal line mentioned in the same definition is the father's agnate paternal line only or includes the father's father's maternal line also, as well as the father's mother's paternal and maternal lines extending to the seventh degree from the propositus. If this question is solved, there will be no difficulty in constructing an exhaustive table of cognate kindred. Mr. Mandlik has constructed four short tables illustrating the *Sapinda* relationship for purposes of marriage at pages 349, 350 and 351, of his treatise on Hindu Law, and though he does not expressly allude to the above question in the exposition of *Sapinda* relationship, the table clearly shows that he understood the maternal as well as the paternal line as referring to the maternal and the paternal line of the mother and the paternal and the maternal lines of each of the ascendants in that line and the paternal and the maternal line of the father and the paternal and the maternal lines of each of the ascendants in that line. This certainly is in accord with the literal and the grammatical meaning of maternal and paternal; and bearing in mind that the cornerstone of the definition is consanguinity or blood relationship, the probability is that the literal meaning was intended and there is no reason for restricting the line to the agnate line of the mother's father or the agnate line of the father. The same will be applicable to the descending and collateral lines of cognates. By reason of a female becoming of the same *gotra* as her husband all the wives of agnates are also declared as agnate *Sapindas*. On referring to the said Table No. I [1] which is exhaustive of the paternal line, it will be seen that by dividing the line paternally and maternally in respect of each ancestor, whether a male or a female, up to seven degrees, there are thirty-two pairs of *Sapindas*, each pair consisting of husband and wife; and on referring to Table No. II, [2] assuming that each pair or stem has one son and one daughter and no more, and that each of his or her descendants up to the seventh degree has one son and one daughter, it

(1) Mandlik's Hindu Law, page 349. (2) Mandlik's Hindu Law, page 350.

will be seen that there are 63 male descendants and 63 female descendants under each pair or stem; or on the whole 2,205, of whom 1,102 are males and 1,103 are females and not as Mandlik puts it 2,016 males and 2,016 females as will be seen from the following:—

The persons mentioned in Table No. I excluding mother (who will be brought under the maternal line) are 63. Add to this number 32 the number of persons omitted in Table I being sister of the propositus and sisters of A to P and brothers of B′ to P′, *i.e.*, 32 + 63=95. Add again 1,984 or 32 × 62, *i.e.*, 62 decendants of each of the above 32 persons omitted in Table I, *i.e.*, 95 + 1,984=2,079. The figure 62 is arrived at thus. Every person has 126 descendants; 63 by his son and 63 by his daughter which son and daughter are brother and sister.(1) *Ex-hypothesi* in Table I the sister of the propositus and the sisters of A to P and brothers of B′ to P′ are omitted. Therefore, the descendants of each omitted sister or brother would be 63—1 (the sister or brother) *i.e.*, 62. To this number 2,079 add the number of descendants of the propositus, *viz.*, 126. The total number of paternal cognates—ascendants, collaterals and descendants included—will be 2,079 + 126 = 2,205. Mr. Mandlik's calculation is wrong because he has included the same set of persons twice over in his calculation; for, some of the descendants of each pair of ascendants will also necessarily be the descendants of the pair above it, as well as of that below. So also, some of the descendants of the propositus will be the descendants of some of the pair of his ascendants. Now passing on to the mother's side, Table No. III (2) which is exhaustive of the ascending lines of the mother exhibits eight pairs or stems, and excluding the first pair whose descendants have been included in the totals already arrived at, *viz.*, 2,205, and assuming that each pair or stem has one son and one daughter and that such son and daughter as well as each descendant of such son or daughter has one son and one daughter the number of *Sapindas* will be 120 of whom 60 are males and 60 females and not 105 males and 105 females as Mr. Mandlik calculates. The number 120 is arrived at thus:—Persons mentioned in his Table No. III excluding A already included under the paternal line are 15.

(1) Table No. 2 at page 350 of Mandlik's Hindu Law.

(2) Mandlik's Hindu Law, page 351.

To this add 7 persons omitted in Table No. III being sisters of B to D and brothers of A′ to D′, *i.e.*, 15 + 7 = 22. To this number 22 add the number of descendants of each of the above omitted 7 persons, *i.e.*, 22 + 7 × 14 = 22 + 98 = 120. The figure 14 is arrived at thus :—Every person has 30 descendants, 15 by his son and 15 by his daughter which son and daughter are brother and sister. *Ex-hypothesi*, in Table III, the brother of A′ to D′ and sisters of B to D are omitted. Therefore, the descendants of each omitted brother or sister would be 15—1 (brother or sister), *i.e.*, 14. The descendants of A′, being also descendants of A, her husband, have already been included in the paternal line. Mr. Mandlik of course commits the same mistake here also, as in his calculation on the paternal side.

Mr. Mandlik, according to his calculation, says that on the maternal side the number of persons ineligible for marriage by a bride or bridegroom is 105 males or females as the case may be, and thus he concludes that on both the lines the number of persons whom the bride or bridegroom as the case may be cannot marry by reason of *Sapinda* relationship is 2,121, the figure mentioned in para. 82 of Mr. Mayne's Hindu Law and Usage, 5th Edition. We have now shown that this calculation is clearly wrong. The correct figures for purposes of marriage are not given in this memorandum, the object being only to arrive at the correct calculation as to the number of *Sapindas* male and female lineally in the ascending and descending lines, and collaterally.

The total number, therefore, of *Sapindas* of a person on both sides, excluding his wife and the wives of the *Sapindas* who are his descendants, is 2,205 + 120 = 2,325.

Proceeding now to divide them into agnates and cognates, it may be at once observed that 120—1 (mother) or 119 *Sapindas* on the mother's side are necessarily cognates; the mother being regarded as an agnate as being the wife of an agnate. Out of the 2,205 *Sapindas* on the paternal side the number of agnates is only 29 as follows :—

In Table No. I, *i.e.*, among the ascendants of the propositus there are 6 male agnates, *viz.*, A, B, C, E, I and Q and 11 female agnates, *viz.*, wives of B, C, E, I and Q (A's wife, *i.e.*, the mother

of the propositus having been included in the maternal line) and the daughters of A, B, C, E, I and Q; thus making a total of 6 + 11 or 17 agnate ascendants. In Table No. II, *i.e.*, among the descendants of the propositus there are 6 male agnates A, B, D, H, P and f, and 6 female agnates A′, B′, D′, H′, P′ and f′ (sisters of A, B, D, H, P and f), thus making a total of 12 agnate descendants. Therefore, in both Tables I & II (ascendants and descendants) we have 29 agnates of whom 12 are males and 17 females. The number of agnates is so small because each pair being assumed to have only one son and one daughter, there are no two persons who are brothers. Deducting these 29 agnates from the total number of *Sapindas* on the paternal side, *viz.*, 2,205, the remaining 2,176 are all cognates. Among these 1,102—12 (the male agnates) or 1,090 are males, while 1,103—17 (female agnates) or 1,086 are females. Among the *Sapindas* on the maternal side amounting to 120, excluding the mother who is the only agnate, there are 119 cognates of whom 60 are males, and 59 are females. The result is, that out of the total number of *Sapindas* 2,325, the agnates are only 30, of whem 12 are males, 7 are females specified as heirs by special texts, and 11 are females not specified in any text. The remaining 2,295 are all cognates, of whom 1,090 + 60 = 1,150 are males and the remaining 1,086 + 59 or 1,145 are females, none of which females finds a place in any specified text; and if therefore by reason of their sex the cognate females none of whom is favoured by any special text be excluded, the heritable cognates under the Mitakshara system is 1,150 of whom excluding the daughter's son, the rest come in as cognates in default of *Samanodakas*. In the above calculation the wife of the propositus, the wives of collaterals, the wives of the descendants of the propositus, and the step-mother, step-grandmother, step-great-grandmother, &c., who are all the wives of ascendants and between whom and the propositus there is no blood-relationship, are excluded, though by a fiction they are brought within the circle of *Sapindas* of the propositus.

It may not be easy to classify the total number of cognate male *Bandhus* into the *three* classes of *Atma-bandhus, Pitru-bandhus* and *Matru-bandhus.* It will require enormous patience and time and considerable skill in applying to such classification the analogy furnished by Satatapa's text, and when such classification

is made, it will be found that in each class there will be several sets, the members of each one of which sets will *inter se* be of equal propinquity to the propositus and as such entitled to succeed in common.

Rajkumar Sarvadhikari in constructing his tables of heritable cognates introduces another principle, *viz.*, that, unless there be mutual *Sapindaship* between the propositus and the claimant, neither of them could inherit to the property left by the other. In regard to agnates mutuality of *Sapindaship* will never be wanting in any case. In regard to cognates it is no doubt true that in some cases the *Sapindaship* is not mutual. This is the result of counting seven degrees in the paternal line but only five degrees in the maternal line. The claimant may be within seven degrees of the paternal line of the propositus and, therefore, his *Sapinda*. But if the propositus be in the maternal line of the claimant beyond *five* degrees, the propositus will not be the *Sapinda* of the claimant. As agnates are necessarily connected on the paternal side of each, this anomaly will never happen in their case. In the case of marriage though there be no mutual *Sapindaship*, there can be no marriage between them. Though Sarvadhikari's view that unless there be mutual *Sapindaship* there can be no right of inheritance of either to the other is plausible and may probably be right, yet he cites no authority in support of that position. In the generality of cases, no doubt, rights of inheritance are mutual, and if Sarvadhikari's view that in every case it must be so, be sound, the number of heritable cognates would have to be considerably reduced. The absence of mutuality of *Sapindaship* occurs only among cognates on the paternal line and not among cognates on the maternal line. By referring to Table No. 2 in Mandlik's book, it will be seen that among the 126 descendants of each of the thirty-one persons omitted in Table No. I there are 48 persons to whom the propositus is not a *Sapinda*, though they are all his *Sapindas*. The total number of cognates, therefore, who will thus have to be excluded from the above number of cognates will be 1,536, made up as follows:—Of the 126 descendants (*vide* Table II) to 48 persons, *i.e.*, all the children of P′ to e′ and of H′ to O′, the propositus is not a *Sapinda*. Therefore, of the ascendants, (the persons omitted in Table I being 31) the number of persons among their descendants, to whom the propositus is not a *Sapinda* will be $31 \times 48 = 1,488$.

To this number add 48 out of the 126 descendants of the propositus to whom the propositus is not a *Sapinda*. The total non-mutual *Sapindas* will therefore be 1,488+48=1,536. Deducting 1,536 the number of non-mutual *Sapindas* from 2,295 the total number of cognate *Sapindas*, the number of heritable cognates, *i.e.*, cognates between whom and the propositus the *Sapindaship* is mutual, is 2,295—1,536 or 759. Among these 759 persons 377 are females. For, on the paternal side out of the total 2,205 *Sapindas*, 1,103 are females, of whom 17 are agnates. Of the remaining 1,103—17 or 1,086 cognates, the non-mutual cognates are ½ of 1,536 or 768. Therefore, the number of cognates between whom and the propositus there is mutual *Sapindaship* is 1,086—768 or 318. On the maternal side, of the 120 *Sapindas*, 60 are females of whom excluding the mother, (the only agnate on the maternal side), we have 60—1 or 59 female cognates between whom and the propositus there is mutual *Sapindaship*. Therefore, on both the paternal and the maternal sides we have 318+59 or 377 females between whom and the propositus there is mutual *Sapindaship*; and excluding these 377 females from inheritance on the ground that none of them is favoured by any special text, the heritable *Bandhas* are reduced to 759—377 or 382 who are all males, and they will have to be classified into *Atma-bandhus*, *Pitru-bandhus* and *Matru-bandhus*. That females unless specially named in any text are incapable of inheritance is fully recognized by the Dayabhaga School by the application of the doctrine of offering of oblations. Under the Mitakshara or Benares School also, they are excluded according to the decisions of the Allahabad and Calcutta High Courts by reason of a Vedic text and certain Smritis which declare females incapable of inheritance. In the Western or Bombay School which is chiefly governed by the Mayukha or the Mitakshara, the rule of exclusion is greatly relaxed and several unnamed females including the widows of collateral agnates and of agnate descendants are allowed to inherit among the class of male agnates. The High Court of Madras is tending to take a middle course and it holds that the Vedic rule of exclusion of females though not disregarded by the author of the Mitakshara is not fully recognized. It has been gradually bringing in, beginning with the sister, a few agnate females as entitled to inherit as cognates, they being, however, postponed at any rate to certain remoter cognate males. At one time owing to a

misconception it was supposed that certain relations may be brought in in the line of inheritance though they are not within the definition of *Bhandus* or *Bhinnagotra Sapindas.* Latterly the process of reasoning on which certain unspecified females are admitted as heirs seems to be that though born in the agnate family of the propositus and as such their *gotra* by birth is the same as that of the propositus, yet as they must be married and married to a stranger, they acquire the *gotra* or the family name of the husband which must be necessarily different from the *gotra* of her birth, and it is conceived that all the female agnates are, therefore, *Bhinnagotra Sapdinas* or cognates; and that the Vedic rule of exclusion of females which is not adopted in its entirety by the author of the Mitakshara should not be pushed so far as to exclude them altogether, but may be given effect to by postponing them at any rate to the males of the same class. Mr. Mandlik has at great length and with considerable force and ability dealt with this question of exclusion of females, and he decidedly comes to the conclusion that the author of the Mitakshara does not relax this rule. Messrs. West and Buhler in their treatise on Hindu Law, 3rd Edition, pp. 125 and 126, and *Chief Justice Westropp* and *Mr. Justice West* in I. L. R., 2 B. 434, try to maintain that the Vedic text has been misinterpreted and that the authors of the Mitakshara and Mayukha do not recognize such a rule of exclusion. As already stated the High Courts of Calcutta and Allahabad have taken a contrary view, while the High Court of Madras takes a middle view. In Yajnavalkya's text, after specifically mentioning a few of the *Sapindas,* the rest are split into *gotrajas* and *Bandhus,* the former, however, including, according to Mitakshara and other works of authority, *Samanodakas* also who are not comprised in the definition of *Sapindas. Gotraja* necessarily means "of the same *gotra*" and some maintain that it denotes the masculine gender and, therefore, will exclude agnate females including the wives of male agnates. But, even if it is of common gender, the question arises in the case of agnate females born in the family, whether they can be regarded as *gotrajas* which they can be regarded to be by birth, bearing in mind that their *gotras* must change permanently by their marriage, and whether, therefore, they being undoubtedly *Sapindas* are not really *Bhinnagotra Sapindas* and as such comprised among cognates or *Bandhus?* Nilakanta maintains that *gotraja*

is indicative of having the same *gotra* by birth and that has considerably influenced the Eastern School. On the whole, the view maintained by the Allahabad and Calcutta High Courts seems to be the sounder view and the recent course of decisions in Madras admitting certain females as heritable cognates, is not founded on any consistent principle, and can be supported only on rather a fanciful interpretation of the term *Bhinnagotra Sapinda* and by the assumption that the authority of the Mitakshara only partially recognizes the Vedic rule of exclusion of females from inheritance. The claim of the step-mother presented itself in *several cases*, but without any success; she by marriage having become of the same *gotra* as her husband and, therefore, of her step-son, cannot(1) be brought under the head of *Bhinnagotra Sapindas* or *Bandhus*; and the Madras High Court has not gone in favour of females as far as the Bombay High Court, which recognizes the widows of all agnate *Sapindas* as heirs, comprised in the class of *gotrajas* of Yajnavalkya. In none of the cases, however, is it declared that she can be no heir at all. In fact the tendency of the recent Madras decisions seems to be to create a non-descript class of *Bandhus* or relations who are not to be recognized as regular heirs but as having heritable capacity as against the crown claiming by escheat. As regards the term *Bhinnagotra Sapindas* it may be mentioned that it does not occur either in the definition of *Sapinda* or in Yajnavalkya's text on Inheritance. The term used in the above text is "*Bandhus*" and the author of the Mitakshara in his Commentary states that *Bhinnagotra Sapindas* are indicated by the term "*Bandhus*." Neither the term "*Bhinnagotra Sapindas*" nor the synonymous term "*Asagotra Sapindas*" is an accurate description of *Bandhus* or cognate *Sapindas*, for, instances can be mentioned in which the cognate may be of the same *gotra* as the propositus. Take for instance the maternal aunt's son, one of the nine *Bandhus* specified in the Mitakshara: he may be of the same *gotra* as the propositus, for, the mother and her sister might marry two males who may be agnates, or if not agnates, at least bearing the same family name or *gotra* and the issue of the two sisters will then be of the same *gotra*. The same thing might happen in the

(1) *Kumaravelu* v. *Virana Goundan*, I. L. R., 5 M., p. 29; *Muttammal* v. *Vengalakshmiammal*, *Ib.* 32; *Mari* v. *Chinnammal*, I. L. R., 8. M., 107; *Ramasami* v. *Narasamma*, *Ib.* 133.

case of the propositus and his daughter's daughter's son. The term *Bhinnagotra Sapinda* or *Asagotra Sapinda* must be understood with reference to the context as used in the sense that the *Sapinda* thereby indicated is not one who like an agnate or *Sagotra Sapinda* should *necessarily* be of the same gotra as the propositus. In fact there is no word which will be an exact and accurate equivalent of cognates or *Bandhus* who form one section of *Sapindas* as above indicated.

Under the Dayabhaga system of Bengal, the number of cognate kindred entitled to succeed, all being males both *ex-parte paterna* and *ex-parte materna*, is only 42, the females in whose favour there is no special text being excluded under that system on the simple ground that they are incompetent to offer oblations.

Under a system which recognizes only such of the cognates as satisfy the religious test, the number is necessarily narrowed to 42. But under a system which recognizes cognates on the principle of consanguinity within prescribed limits, the number is necessarily large amounting to 382 even after excluding females.

Rajkumar Sarvadhikari has made an elaborate and ingenious attempt in his Tagore Law Lectures, pages 687 to 735, to construct a table of *Bandhus* under the Mitakshara which is justly characterised as follows by *Dr. Jolly* :—

"An essentially new system of *Bandhu* relationship under "Mitakshara law has been recently proposed by Rajkumar Sar-"vadhikari. He takes the three *Bandhus* each as indicative of the "three principal classes of *Bandhus* and not as embracing the nine "*Bandhus* specially named only. This theory has the advantage of "giving a clue to the order of precedence among the *Bandhus*. "However though it is developed with rigorous logic from the "data put forth by its author, there is no sufficient foundation for "these data in the Mitakshara to commend its ready acceptance." (Tagore Law Lectures for 1883, by Dr. Jolly, p. 216.) At page 689 Sarvadhikari says that, in the case of *Bandhus* on the paternal side, there cannot be more than two females between the claimant and the propositus, and that, if there are two females, these two must be related as mother and daughter to each other. What his authority is for this position does not at all appear. If the father's line and the mother's line should be interpreted and

restricted to the father's agnate line, no more than one female can intervene and two females cannot intervene though they be related as mother and daughter. If, as already shown, there is no warrant for limiting the two lines to agnate lines, and that Sarvadhikari does not so limit it follows from his allowing the intervention of two females, it is impossible to find any principle in support of the position taken by him that more than two females cannot intervene between the propositus and the claimant. If he means thereby that *Sapinda* relationship as defined cannot subsist if more than two females intervene or even if two females who are not related as mother and daughter intervene, he is palpably wrong; but if he means that though *Sapinda* relationship may subsist, yet the claimant will not be a heritable cognate the position will be equally unwarranted; and he nowhere cites any authority that all *Bhinnagotra Sapindas* have no heritable rights under the Mitakshara but that only some of them have. No doubt among the nine *Bandhus* specified in the text of Satatapa, there is no instance in which three females intervene between the common ancestor and either the propositus or the claimant, and that in two instances therein given, *viz.*, the mother's maternal uncle's son and the mother's maternal aunt's son, two females related as mother and daughter, the maternal grandmother and the mother intervene between the common ancestor and the propositus.(1)

The enumeration being admittedly not exhaustive and the classification being illustrated by mentioning only three of each class, all the nine therein mentioned being within the definition of *Sapindas*, it will be altogether illogical and contrary to all rules of interpretation to exclude from the definition of *Sapindas*, *Bandhus* not enumerated in Satatapa's text or even such of the *Bandhus* as may be more remotely connected than any of the nine therein mentioned. Again at page 697, referring to the diagram therein given, Sarvadhikari says that B and B—s_3 are not heritable Sapindas of each other either through themselves or through their mothers and fathers and consequently the propositus and B—s_3 are not each other's *Sapindas*. They are not each other's *Sapindas* connected in such a manner that the heritable right may accrue to B—s_3 because the

(1) Mayne's Hindu Law, p. 667.

propositus is not a descendant of the line of the maternal grandfather either of B—s_3 or of his father, or of his mother. Similarly the propositus and C—s_2 are not *Sapindas* to each other either through themselves or through their fathers or their mothers. It is evident from this that Sarvadhikari labours under the impression that *Sapinda* relationships for purposes of inheritance is not co-extensive with the definition of *Sapinda* relationship for purposes of marriage, but that it is restricted to cases in which the propositus is a descendant of the line of the maternal grandfather either of the claimant or of his father or of his mother. This assumption again he probably makes because the nine specified *Bandhus* are so descended from such maternal grandfather either from the standpoint of the propositus or of the claimant.

JURISPRUDENCE.

TRANSLATED FROM THE VIVADARATNAKARA.

CHAPTER XVIII.

On the Kshetraja Son.

After defining the *aurasa* son, Vasishtha says :—" In default of him, the second, the son of a wife duly authorised, shall inherit.'(1) *Commentary*—' Authorised,' *i.e.*, by the husband or by his elders. ' Second,' *i.e.*, to the *aurasa* son.

Vishnu says : " The son begotten on the duly authorised wife by a *sapinda* or by one of the highest class is the second, the *kshetraja* son."(2)

Manu says : " He who is begotten according to law on the wife of a man deceased, impotent or diseased, after she is duly authorised is called the *kshetraja* or the son of the wife." (3) *Commentary* —' *Talpah* ' means ' wife.' The disease contemplated must be incurable. ' According to law,' *i.e.*, ' after being smeared with ghee, etc.'

Yajnavalkya says : " The son begotten on a wife by one of the same *gotra* with the husband or by another is called the *kshetraja* son."(4) *Commentary*—' *Sagotrena* ' means ' by one of the same family.' ' Another,' *i.e.*, of the highest class.

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(1) Vasishtha, Chap. XVII, 14. (2) Vishnu, Chap. XV, 3.

(3) Manu; Chap. IX, 167. (4) Yajnavalkya, Chap. II, 128.

Baudhayana says :—" The son begotten by another on the wife of a man deceased, impotent or diseased after being duly authorised in that behalf, is called the *kshetraja* or the son of the wife. He becomes the son of two fathers, is of both the families and performs the obsequies and takes the heritable wealth of both the fathers."(1) *Commentary*—He who is begotten by another sonless man, such as the brother-in-law, etc. The form '*Dvipita*' is grammatically correct, the *kap* suffix being optional. '*Dvigotrah*' means 'belonging to both families.' '*Svâdah*' means 'obsequies.'

Yajnavalkya says :—" The son begotten by a sonless man on the wife of another duly authorised is declared heir to both and shall perform the funeral rites of both fathers."(2) *Commentary.*—But when a man having a son begets a son for another upon that other's wife, the son so begotten belongs not to the begetter but to the husband of the mother. But if though having a son, he begets a son upon another's wife and sets about it saying 'the son to be born shall belong equally to us both,' then the son so begotten becomes the son of both.

Manu says :—" The owners of the seed and of the soil are seen in this world as joint sharers of the crop, where the seed had been given in consideration of a special agreement to share the crop."(3)

Narada and Katyayana say : " The offspring of the seed sown by one in another's field with the owner's permission is considered to belong equally to the owners of the seed and of the soil."(4)

Sankha and Likhita say :—" Angiras has declared that the offspring belongs to the husband of the mother. But Usanas says that the produce of the seed sown with the consent of the owners of the soil and of the seed shall be shared by both."(5) *Commentary*—'*Mantrasamskarakartuh*' means 'of the husband who takes her hand.' '*Sasyam*' means 'produce of the soil.'

Harita says : " The son begotten on the wife by another, her husband living, is considered by some as that husband's alone

(1) Baudhayana, II, 2, 3, 17 and 18.

(2) Yajnavalkya, Chap. II, 127.

(3) Manu, Chap. IX, 53.

(4) Not found in Narada but quoted at page 366, Cole. Dig., Vol. II, as Katyayana's.

(5) Cole. Dig., Vol. II, 363, CCXL.

because she was not independent. If begotten after his death, the son is considered as the son of two fathers; because the husband did not sow the seed. The soil produces nothing without the seed; nor does seed germinate without soil. As both these are seen, some say that he is the son of both. Among these, he is primarily the son of the begetter. Let him offer two funeral cakes and celebrate both fathers with each cake. His son shall name both with the second cake, his grandson with the third; and those remoter descended down to the seventh degree shall make this offering for both ancestors to three degrees."(1) *Commentary*—While the husband is alive, the *kshetraja*, though born of another, belongs to the husband, because women are not independent. When he is dead, although the dependence of the wife survives according to the text, 'The sonless wife not violating the bed of her husband, etc.,' still sages declare the *kshetraja* to be the son of two fathers, because the seed had not been sown in the soil. Not that there is the sower of the seed when the husband is alive; but that, as the author says, the combination of the virtue of the seed and of the soil with the consent of their owners is the cause of the offspring. '*Nirvapah*' means 'rites in honor of the deceased'; because by them the deceased are propitiated. He may celebrate both fathers with the same *pinda* or both with each of the *pindas*. If he is the son of two fathers he must celebrate both with each of the *pindas*. This is agreeable to Apastamba's view. '*Dvitiya putram*' means 'beginning with the son, with the second cake, etc.' Those remoter descendants who offer the wipings shall make the offering in celebration of both ancestors in each of three degrees.

Narada says: "The son of two fathers shall separately offer *pinda* and water to both and shall take half a share from the estate of his begetter and another half from the estate of his mother's husband."(2) *Commentary*—This text applies where the begetter has an *aurasa* son and the husband of the wife has somehow an *aurasa* son subsequently born. But when neither of them has another son, he takes all the wealth of both.

Baudhayana says: "They also quote as follows: He, the *kshetraja* son, shall offer *pinda* to both, and with every *pinda* he shall pronounce both names. To six, three *pindas* should be given;

(1) Cole. Dig., Vol. II, 365, CCXLI. (2) Narada, Chap. XIII, 23.

so acting, he incurs no sin."(1) *Commentary*—'Incurs no sin' means 'is not censurable.'

Here ends the chapter on the *Kshetraja*.

CHAPTER XIX.

On the appointed daughter and her son.

On this subject, Vasishtha says: "An appointed daughter is considered as the third kind of son. She who has no brothers acquires filiation reverting to the family of her ancestors and becomes equal to a son."(2) *Commentary*—'An appointed daughter is the third son, equal to the *aurasa* son, because she performs his duties. She reverts to the family of her ancestors and attains the rank of a son.

Sankha and Likhita say: "The son of Prachetas has said that the appointed daughter is like the son. Her offspring (the son of the appointed daughter) shall offer the *pinda* to both the maternal and the paternal grandfathers. There is no difference perceived in the world between a son and a daughter's son in respect of benefits conferred by them. From this doubt a man should not marry a brotherless maiden."(3) *Commentary*—'Benefits conferred,' *i.e.*, delivery from the hell called *put*. 'From this doubt' means 'from the doubt whether she has been made an appointed daughter or not.'

Yajnavalkya after speaking of the *aurasa* says: "The son of the appointed daughter is equal to him."(4)

Devala says: "The son of the appointed daughter is equal to him, the *aurasa* son, and like a son shall inherit the wealth of his father and also of his maternal grandfather, if he has no male issue."(5)

Baudhayana says: "A son born of a daughter expressly appointed is the son of an appointed daughter, any other is a daughter's son."(6) *Commentary*—'*Abhyubhajanya*' means

(1) Baudhayana, II. 2, 3, 19.
(2) Vasishtha, Chap. XVII, 15 and 16.
(3) Cole. Dig., Vol. II, 338, CCIV.
(4) Yajnavalkya, Chap. II, 128.
(5) Cole. Dig., Vol. II, 337, CCI.
(6) Baudhayana, II, 2, 3, 15.

appointed with the statement in the form 'the son born of this (daughter) shall be my son.' '*Dauhira*' means 'son of the daughter.' He should be regarded as the son named 'the son of the appointed daughter.' 'Any other,' *i.e.*, than such daughter's son. Kalpataru reads '*asyam*' for '*anyam*.' That is easily understood.

Manu says: "The son of the appointed daughter shall inherit the whole wealth of his sonless father. A daughter's son alone inherits the whole wealth of the sonless deceased."(1) *Commentary*—'Sonless' means 'having no *aurasa* son.' Prakâsakâra says that the second half of the verse is an explanatory repetition of the first. Udayakara in his commentary on Manu says that the second half repeats the same statement with a reason.

Devala after speaking of the *aurasa* son says: "The son of the appointed daughter is equal to him (the *aurasa* son) and is regarded as an heir. He alone shall give the *pinda* to his father and his maternal grandfather. There is no distinction in the world, according to law, between a son's son and a daughter's son; because the father and the mother of these were born out of the same body. By the son who is born of a daughter whether appointed or not, from a husband equal in caste, the maternal grandfather becomes a father. He shall give the *pinda* to the maternal grandfather and take his wealth."(2) *Commentary*—'Sonless' means 'having no *aurasa* son.' *The daughter's son* is the son of the daughter whether appointed or not.

Brihaspati in speaking of the appointed daughter says: "Just as she has ownership in the wealth of her father, even though there are kinsmen, so her son also has ownership in the wealth of his mother and his maternal grandfather."(3)

Sankha and Likhita say: "The daughter takes the *stridhana*, and the wealth of her mother's son also is her share."(4) *Commentary*—The word '*tat*' stands for 'the daughter's mother.' Of her son subsequently born and dying without male issue, the daughter

(1) Manu, Chap. IX, 132.

(2) Not found in Cole. Dig. This text belongs probably to some other author, in view to Devala's text already quoted.

(3) Brihaspati, Chap. XXV, 58.

(4) Cole. Dig., 353, CCXXV.

takes the wealth; because she is equal to the deceased's brother. This is the drift.

Manu says: "A sonless man may appoint his daughter in the following manner, to raise offspring for him:—'The male child to be born of her shall be mine and perform my funeral rites.' "(1) *Commentary*—'*Svadakaran*' means 'performing *sraddha*, etc.'

Vasishtha says: "I give my brotherless daughter decorated to you, thinking that the son who shall be born of her will become my son."(2)

Gautama says: "A man having no male issue may appoint a daughter after making an oblation to the fire and performing the *Prajapatya* sacrifice declaring 'her offspring shall be mine.' But some say she may be so appointed by mere intention."(3) *Commentary*—'*Agnim Prajapatim cheshtwa*' means 'after performing the *Agneyi* and the *Prajapatya* sacrifices' or 'performing a single sacrifice with the legal fire' or in default of it, simply worshipping. So says Harihara. '*Samvadhya*' means 'after declaring.' '*Abhisandhimatrat*' means 'by mere intention.' This is a corroboration of the previous view.

Brihaspati says: "Gautama said that a daughter should be appointed after oblation to the fire and the Prajapatya sacrifice. But others have said that the daughter of a sonless man is appointed by his mere will."(4) *Commentary*—'*Chinthitha*' means "at the thought 'this is my appointed daughter.' "

Vishnu says: "The declaration is in the form 'The son who shall be born of her shall be my son.' "(5) *Commentary*—She who is given as an appointed daughter and who has neither father nor mother is certainly an appointed daughter.

The Brahma Purana says: "The daughter of a sonless man who is treated in his mind like a son or appointed in the presence of the king, the sacrificial fire, or kinsmen, or anywhere or by him supposed to be a son when in the womb or given to the bride-

(1) Manu, Chap. IX, 127.
(2) Vasishtha, Chap. XVII, 17.
(3) Gautama, Chap. XXVIII, 18 and 19.
(4) Brihaspati, Chap. XXV, 38
(5) Vishnu, Chap. XV, 5.

groom with *sulka* for that express purpose, after the death of the father should be regarded as an appointed daughter. Such a daughter takes an equal share of the paternal wealth."(1)

Manu says: "Let the son of an appointed daughter offer the first funeral cake to his mother, the second to her father and the third to the father's father."(2) *Commentary*—The word '*Asyah*' (of her) should be read into the last clause.

Here ends the chapter on 'the appointed daughter and her son.'

CHAPTER XX.

On the son by a twice-married woman.

On this subject, Vishnu says: "The fourth in order is the son by a twice-married woman."(3)

Manu says: "The son whom a woman either forsaken by her lord or a widow begets of a second husband whom she married out of free will is called the son of a twice-married woman."(4) *Commentary*—After 'begets' the word '*savarnat*' (of one equal in caste) must be read. '*Punarbhutva*' means 'having married a second husband.'

Yajnavalkya says: "A son begotten upon the wife (of another) whether deflowered or not is called the son of a twice-married woman."(5)

Katyayana says: "A son begotten on a woman who deserting an impotent or degraded husband marries a second is the son by a twice-married woman. He clearly belongs to the begetter."(6)

Here ends the chapter on 'the son by a twice-married woman.'

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(1) Cole. Dig., Vol. II, 356, 2 & 3.
(2) Manu, Chap. IX, 140.
(3) Vishnu, Chap. XV, 7.
(4) Manu, Chap. IX, 175.
(5) Yajnavalkya, Chap. II, 130.
(6) Cole. Dig., Vol. II, 383, CCLXVIII.

CHAPTER XXI.

On the son of a maiden.

Vasishtha says: "The son of a maiden is the fifth in rank. The son whom an unmarried damsel produces through lust in her father's house is called the son of a maiden and becomes the son of his maternal grandfather. So sages have declared. On this point, they also quote the following verse: 'By the son whom an unmarried daughter produces from a man equal in caste, the maternal grandfather becomes a father. He shall offer the funeral cake and take the wealth.' "(1) *Commentary*—'Kamat' means 'of her own free will.' 'Apradatta' means 'unmarried.' '*Tulyatah*' means 'from a man equal in caste.'

Baudhayana says: "The son begotten on a damsel not married and not given is called the son of a maiden."(2) *Commentary*—'*Asamskrita*' means 'devoid of the *samskara* of marriage.' '*Anatisrishte*' means 'not given.'

The Brahma Purana says: "The son begotten upon an unmarried woman in her father's house by a man equal in caste is called the son of the maiden and becomes the son of the man to whom she is afterwards given."(3)

Narada says: "The husband should be regarded as the father of the son produced by his wife while a maiden, the son of the pregnant bride and the son of concealed birth. They are also declared heirs to his wealth."(4) *Commentary*—'*Sahodha*' means 'conceived in the womb at the time of marriage.' Here if the maternal grandfather has no son, then the son of the maiden and the son of the pregnant bride are his sons. If the maternal grandfather has sons, then they are the sons of the husband. Where both are sonless, they are sons of both. So says Parijata.

Here ends the chapter on 'the son of the maiden.'

(1) Vasishtha, Chap XVII, 21, 22 and 23.
(2) Baudhayana, II, 2, 3, 24.
(3) Not found.
(4) Narada, Chap. XIII, 17.

CHAPTER XXII.

On the son of concealed birth.

On this subject, Vishnu says: "The son of concealed birth is the sixth in rank. He belongs to him on whose wife he was begotten."(1)

Manu says: "A son born in whose house soever, if his father could not be discovered, belongs to the husband of the wife of whom he is born; and is called the son of concealed birth in his house."(2) *Commentary*—'*Talpajah*' means 'born of the wife.' As the owner of the seed is not known, he certainly belongs to his mother's caste. This would be so in the absence of suspicion of connection with one of inferior caste. But where such suspicion exists he is unfit for all purposes and would belong to the *pratiloma* class.

Here ends the chapter on 'the son of concealed birth.'

CHAPTER XXIII.

On the son of the pregnant bride.

On this subject, Vishnu says: "The son of the pregnant bride is the seventh in rank."(3) *Commentary*—The son of the pregnant bride belongs to the husband who marries her. Here Prakasakara considering that the *mantras* relating to the marriage ceremony apply only to maidens, questions the *sam-skara* of a pregnant woman. He concludes by saying that according to others, there is a mode pointed out in the *Srutis* of repeating the same *samskara* according to the form prescribed in the Atharvana Veda. But really the word '*samskara*' contemplates purification by *homa* and other *karma* distinct from that produced by the *mantras* recited at the time of marriage.

Manu says: "If a pregnant woman, whether known or not known to be pregnant, is married, the son in the womb belongs to the husband and is called the son of the pregnant bride."(4)

Here ends the chapter on 'the son of the pregnant bride.'

S. SITARAMA SASTRI.

(1) Vishnu, Chap. XV, 13 and 14.
(2) Manu, Chap. IX, 170.
(3) Vishnu, Chap. XV, 15.
(4) Manu, Chap. IX, 173.

NOTES OF INDIAN CASES.

Queen-Empress *v.* Motha, I. L. R., 20 M., 239. There seems to us to be very little doubt that it is competent to a court asked to give sanction under S. 195 to hold an enquiry and record other evidence than that already before it. It is one thing to say that such a course is legal, but it is quite another to recommend it as proper. The policy of the law requiring sanction before a prosecution for perjury is to ensure that only gross cases shall be brought before the criminal tribunals and that there should be no reasonable possibility of the offender escaping justice. If the culpability was not manifest on the face of the record, it would seem to us highly undesirable to determine whether a particular statement can be proved to be false. If recording of additional evidence was contemplated, S. 195 would have made a reference to such preliminary enquiry as might be necessary. The absence of that language which appears on the other hand in S. 476 is an index to the undesirability of such a procedure.

Balusami Pandithar *v.* Narayana Rau, I. L. R., 20 M., 342. There is an interesting question of Hindu law in this case as to whether a sister's son's son or a maternal uncle's son is the nearer heir. The case forcibly illustrates the meagreness of the *Smrithi* law. Courts have had to evolve from a very few texts the whole class of heritable *bandhus* and the relative superiority of the members of that body. Both the individuals named are of course in the class of *atma bandhus.* No rule of preference within each class has been in terms laid down. The learned Judges have had recourse to two principles for the purpose of arriving at a conclusion in the case. One is, the sister's son's son claims relationship through a nearer ancestor of the propositus, namely, the father, than the maternal uncle's son. Another, that a *bandhu, ex-parte paterna,* is preferable to a *bandhu, ex-parte materna.* The latter principle is supposed to underlie the order of enumeration of the *bandhus* of each class, the father's sister's son being mentioned first. Other cases may be conceived in which these two principles may come into conflict. Which of them is then to prevail is not indicated by the learned Judges.

Ponnambala Pillai *v.* Sundarappayyar, I.L.R., 20 M., 354. This case raises rather a novel question of Hindu Law. There was a contract for sale of property made by a father to whom a son is born after the contract; and the vendee obtains a decree for specific performance in a suit against the father alone. The question raised is whether the son has any right to recover his share. The father contracted to sell the whole, and there is no doubt that he was perfectly justified in doing so. It is equally clear that the father's right to deal with the son's share also

is subject to the condition that there should be justifiable necessity or an antecedent debt or at least a sufficient enquiry of the purpose on the part of the purchaser. The fact that there was a binding obligation upon the father would entitle the purchaser to recover damages if the father failed to complete the purchase. Is there any difficulty in regarding the antecedent obligation as of the same character as an antecedent debt so as to justify the alienation? Even though by operation of law, an undefined share of the property has passed to the son by his subsequent birth, it seems open to question whether there is anything wrong in extending the scope of the father's power to alienate in discharge of his antecedent debts to alienations in discharge of other antecedent obligations. Nor do we see why the son should be in a better position than a purchaser from the father with notice. The point is, however, one not free from difficulty and should have received, we think, better treatment at the hands of the learned Judges.

Krishnasami Ayyangar *v.* **Ranga Ayyangar**, I.L.R., 20 M., 369. A decree for partition having been made, an agreement was entered into with reference to a portion of the property which fell to the share of one of the plaintiffs who died, his share passing to a survivor. A suit brought upon the basis of that agreement for the property agreed to be given was dismissed though it was held that an action for damages would lie for a breach of contract. According to the present Code, there is nothing to prevent the agreement forming the subject of a fresh suit. In the case of decrees for money where there is an uncertified *payment*, a fresh suit does not lie for the recovery of the money, but only for damages for breach of the contract to certify. But an *agreement* to deliver land might well form the subject of a fresh suit.

Rangayya Appa Rao *v.* **Ratnam**, I. L. R., 20 M., 392. In a suit to set aside a distraint, it was held that the pattah was improper and the distraint was set aside. In a subsequent suit to recover rent upon the same pattah, it was held by *Subrahmania Aiyar* and *Boddam*, J. J., that the decision of the Revenue Court has not the force of *res judicata*. There can be no doubt that the learned Judges are right, having regard to the language of S. 13. But there ought to be a more satisfactory statement of the law in the statute concerned.

Vasudeva Upadyaya *v.* **Visvaraja Thirthasami**, I. L. R., 20 M., 407. An appeal against an order of remand was disposed of by a single Judge of the High Court and the question was whether an appeal lay from his order under S. 15 of the Letters Patent. We have already expressed our opinion that such an appeal does lie and that the Code of Civil Procedure does not overrule S. 15 of the Letters Patent, 2 M.L.J. 343. We

must express our concurrence in the view of *Subrahmania Aiyar*, J., and can only add our regret that the question was not referred to a Full Bench.

Ramalinga Chetti *v.* **Raghunatha Rau,** I. L. R., 20 M.,418. The plaintiff sued the defendant for money due upon a balance of account. The defendant alleged that the balance was in his favor. The defendant first stated that he would file a separate suit for the recovery of the balance but afterwards asked leave for the amendment of the written statement and for the insertion of a claim for the balance. The Sub-Judge refused the amendment and the High Court upheld the refusal. The plaintiff did not ask for an account, because he was the accounting party. We think there is nothing to prevent the defendant claiming a decree for the actual balance in case upon taking accounts there was such a balance in his favour. It is not necessary that the suit should have been one for an account to entitle the defendant to a decree for the balance, but it was quite sufficient if the taking of accounts was necessary for determining if there was a balance due to the plaintiff. It may be that S. 12 does not bar a separate suit, but the defendant is entitled and it is undoubtedly convenient to have the question of what amount is due to him settled in one and the same suit.

Uthunganakath Avuthala *v.* **Thazhatharayil Kunhali,** I.L.R., 20 M., 435. We doubt the correctness of the decision in this case. An agreement not to demand compensation for improvements previously effected, does not appear to us to come within the scope of S. 12 of the Tenants' Improvements Act of 1887. It is certainly open to the tenant not to claim improvements in the suit or to agree to a compromise whereby he relinquishes the claim and it follows to our mind that he could do so before suit. The policy of the law is to invalidate contracts entered into in anticipation and to prevent the landlord profiting by them as such bargains are notoriously improvident. We think the grammatical interpretation of the section as well as the logical is against the view taken by the learned Judges.

Ramasami Kottadiar *v* **Murugesa Mudali,** I. L. R., 20 M., 452. The property of a debtor who had become insolvent, and as regards whose property a vesting order had been made was attached in execution of a decree against him. This attachment is clearly illegal. When the vesting order is discharged we do not think that the attachment can be deemed to have been subsisting. At all events, at the same time the vesting order is discharged, a composition deed to which the attaching creditor was a party, vested the property in the trustees. It appears to us that the trustees

take the property free from attachment. The attachment was invalid during the subsistence of the vesting order and the moment the vesting order was withdrawn the property passes to the trustee under the composition deed. The view taken by the learned Judges that the trustees take the property subject to the attachment does not appear to us to be sound.

Barbar Maran *v.* Ramana Goundan, I. L. R., 20 M., 461. The decision in this case is one of considerable importance. Payment to one of two joint mortgagees is held to be a sufficient discharge. *The Chief Justice* and *Shephard*, J., dissent from the English case of *Steeds* v. *Steeds*, 22 Q. B. D., 540. We think there is considerable force in the argument of the learned Judges against the correctness of the decision in the English case. There is no doubt that the view taken should be the law, even though it be not.

Gantapalli Appalamma *v.* Gantapalli Yellayya, I. L. R., 20 M., 470. There can be very little doubt that the decision in *Queen-Empress* v. *Mannatha Achari*, I. L. R., 17 M., 260, was rightly overruled in this case. The adultery of the husband which entitles the wife to claim separate maintenance cannot be confined to the offence defined in the Indian Penal Code. The words 'living in adultery' point of course to a continuous course of conduct as explained by *Shephard*, J. But the conduct continued need not be what is punishable under the Penal Code.

SUMMERY OF RECENT CASES.

Civil Procedure Code, S. 108—Decree ex-parte—Appearance—Pleader retained in suit but not instructed.

Shankar Dat Dube *v.* Radha Krishna.

A party defendant retained a pleader to defend the suit against him and the pleader filed a vakalatnamah and did certain acts for the defendant. However, when the suit came on for hearing the pleader came into Court and stated that he had no instructions and could not go on with the case, practically, that he had retired from the case. The Court proceeded with the suit and made a decree in favour of the plaintiff.

Held: that this decree was a decree *ex-parte* within the meaning of S. 108 of the Code of Civil Procedure. *Bhagwan Dai* v. *Hira* (I. L. R., 19 A., 355) and *Jonardan Dobey* v. *Ramdhone Singh* (I. L. R., 23 C., 738) referred to. *Sahibzada Zein-ul-abdin Khan* v. *Ahmed Raza Khan* (L. R., 5 I. A., 233) distinguished:—*The Allahabad Weekly Notes for* 1898, *p.* 17.

Civil Procedure Code, Ss. 483 and 588—Appeal—Order refusing attachment.

Amba Prasad v. Narain Das.

No appeal lies under S. 588 of the Code of Civil Procedure from an order dismissing an application under S. 483 of the Code for an order for the attachment of some property to meet any decree which the applicant might obtain under S. 90 of the Transfer of Property Act, 1882:—*The Allahabad Weekly Notes for* 1898, *p.* 18.

Civil Procedure Code, S. 440—Guardian and minor—Suit brought on behalf of a minor by a person other than the minor's certificated guardian.

Sham Krishna v. Ram Das.

Where a suit was filed on behalf of two minors by a person who was not the certificated guardian of the minors, there being a guardian duly appointed by a competent Court in existence at the time, it was *held* that the suit was wrongly brought, having regard to. S. 440 of the Code of Civil Procedure, and that the plaint should have been returned for amendment, and that the defect in the form of the suit was not cured by the fact, if it was one, that the person appearing therein as guardian of the minors was the *karta* of a joint Hindu family of which all the plaintiffs were members. *Beni Ram Bhutt* v. *Ram Lal Dhukri* (I. L. R., 13 C., 189) referred to:—*The Allahabad Weekly Notes for* 1898, *p.* 9.

Act No. IX of 1887 (*Provincial Small Cause Courts Act*), *sch. ii, cl.* 31—*Civil Procedure Code, s.* 586—*Suit of the nature cognizable by a Court of Small Causes—Suit for damages for eviction from land—Jurisdiction.*

Prasadi Lal v. Imdad Husen.

A suit to recover damages on account of the alleged wrongful eviction of the plaintiff from immovable property is not a suit falling within clause 31 of the second schedule to Act No. IX of 1887, though the profits of the property may be a measure of the damages claimed. *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (I. L. R., 23 C., 884) followed;—*The Allahabad Weekly Notes for* 1898, *p.* 10.

Admiralty—Damage by collision—Public body entitled to damages.

The Owner of No. 7 Steam Sand Pump Dredger *v.* The Owners of S.S. "Greta Holme." 'The Greta Holme." [1897, A. C. 596].

"It is clear law that in general a person who had been deprived of the use of a chattel through the wrongful act of another is entitled to recover damages in respect thereof, even though he cannot prove what has been called tangible pecuniary loss by which is meant that he is a definite sum of money out of pocket owing to the wrong he has sustaind." It was attempted in this case to limit the application of this principle of law by excluding from its operation cases where the person injured happens to be a public body that has a duty cast upon it to be discharged for the benefit of the public and consequently cannot in any sense be said to own a chattel so as to derive for itself some profit by the use of it. The House, however, by a large majority refused to accept this limitation. The steamship *Greta Holme* belonging to the respondents, owing to her negligence, collided in the river Mersey with the Steam Sand Pump Dredger No. 7, which is the property of Mersey Docks and Harbour Board the appellants; and in consequence the respondents were condemned in damages, the amount of it being left to the Registrar for determination. The Registrar refused to allow the plaintiffs one main item, *i.e.*, a sum of money representing the loss to which the plaintiffs were put to during the time the dredger was under repair. The main reason assigned was that the plaintiffs were not in the position of a trading company and were not entitled to claim loss of profits, and although their dredging operations were, no doubt, delayed by the disabling of the dredger, it does not appear to us that the plaintiffs have sustained any tangible pecuniary loss." This decision of the Registrar was upheld by the President of the Probate Division and by the Court of Appeal. The plaintiffs then preferred an appeal to the House of Lords and that House reversed the decision of the Courts below and held that the plaintiffs notwithstanding that they were a public body were entitled to the right to which they would have been entitled if they had been a private body or individual

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Declaration with respect to rights over which there is no jurisdiction.

Barraclough *v.* Brown and others [1897, A. C. 615].

S. 47 of the Aire and Calder Navigation Act, 1889, enacts that where any vessel is sunk in the river Ouse and abandoned by its owner, it shall be lawful for the undertakers to remove the wreck and recover

their expenses of such removal from the owner of the vessel in a court of summary jurisdiction. The plaintiff who was the secretary to the undertakers of the rivers, Aire and Calder, and in whom the navigation of the river Ouse had been vested sued the defendants for the recovery of the sum they had expended in removing their steamship *J. M. Lennard*, which had capsized and sunk in the river and subsequently abandoned by the defendants her owners. The action was brought in the High Court and purported to be based upon S. 47, mentioned above. The House of Lords held that at common law the defendants were under no liability to pay these expenses and that as the liability was one created by a statute it could be enforced only in the way which the statute has provided for its enforcement. The House was, therefore, of opinion that the High Court had no jurisdiction to entertain the suit. An argument was advanced for the plaintiffs, *i.e.*, that although the High Court might have no power to grant a debt decree, it may grant a declaration that on a true constitution of S. 47, the plaintiffs were entitled to recover the amount from the defendants. The House overruled this argument without any hesitation. In so doing, *Lord Watson*, a member of the House observed :—

"In the absence of authority, I am not prepared to hold that the High Court of Justice has any power to make declarations of right with respect to any matter from which its jurisdiction is excluded by an Act of the Legislature; and were such an authority produced, I should be inclined to overrule it. The declaration which we were invited to make could be of no practical utility, and it would be an interference by a court having no jurisdiction in the matter with the plenary jurisdiction conferred by the Legislature upon another tribunal."

Easements—Benefit to dominant tenement.

Simpson *v.* The Mayor, &c., of Godmanchester and another.

[1897, A. C. 696].

The appellant brought an action against the respondents for an injunction to restrain them from trespassing upon or interfering with his locks on the banks of the river Ouse. The plaintiff had certain locks on the banks of the river within his estate by which the water of the river can be let out in times of flood into the fields on the sides of the river and thus save the lands lower down from inundation. The respondents were the owners of some lands lower down the river from the point where those locks were situated and they from time immemorial enjoyed as of right, and without interruption, the right of opening these

locks in times of flood or upon every likelihood of flood and thus save their lands from damage by inundation. In the Courts below the plaintiff contended that this was a new kind of easement unknown to law and as such ought not to be recognised. But this contention was overruled by the Lord Chancellor and other Judges who sat with him in the Court of Appeal (*vide* 1896, 1 ch. 214, and VI, M. L. J., 116). The plaintiff then preferred this appeal to the House of Lords and raised a new question there that an easement of the nature said to have been exercised by the respondent corporation cannot be legally constituted in favor of the lands vested in the respondent corporation as dominant tenement inasmuch as lands other than those of the respondents to which no such easement is attached were benefited by its exercise. This contention, however, was rejected by the House. *Lord Watson* in delivering judgment said:— "But the proposition is as destitute of foundation in authority as it is, in my opinion, unreasonable. It is no doubt one of the essential characteristics of a legal easement that its exercise shall be for the use and benefit of the dominant estate. But there is no law to the effect that an easement which is serviceable and beneficial to that estate shall cease to exist whenever from the nature of the right its exercise by the dominant estate confers, or tends to confer, some benefit upon other lands or tenements." The decision of the Court of Appeal was therefore confirmed.

Trade name—Common law right in name—Fraud.

The Birmingham Venegar Brewery Company, Limited, *v.* Powell.

[1897, A. C. 710].

Turner, L. J., said in *Burgess* v. *Burgess* [1853, 3 D. M. and G., 204]:— "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another." This proposition has been accepted and acted upon by courts of justice for a long number of years. A daring, and we hope a last, attempt was made in this case to shake the authority of the dictum above cited. The respondent had for a number of years been manufacturing a sauce, in accordance with a secret recipe, and selling it in the market under the name of "Yorkshire relish." The name had come to mean in the market the respondent's manufacture. The appellants recently began to manufacture a similar sauce and sold it in the market also under the name of "Yorkshire relish" so that the public bought it under the mistaken belief that it was the respondent's manufacture though many of the purchasers did not know the respondent by name in connection with the manu-

facture. Under these circumstances, *Stirling*, J., and confirming his decision, the Court of Appeal granted an injunction to the respondents restraining the appellants from using the expression "Yorkshire relish" on their labels. The appeal was argued for three days in the House and the decision of the Courts below was finally confirmed. One new point that was settled by the decision of the House in this case is that it is wrong to suppose that one trader cannot pass his goods off as the goods of another within the meaning of the rule above cited, unless it be shown that the persons purchasing the goods know of the manufacturer by name, and have in their minds at the time of the purchase the idea that they are made by that individual. The House unanimously overruled such a contention and confirmed the decision of the Court of Appeal [*vide* 1896, 2 Ch., 54.]

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications:—

The Judicial Trustees' Act of 1896 *with notes* by Gerald John Wheeler, M.A., L.L.B., published by *Butterworth and Co.*, 7, *Fleet Street E. C.*, *London*:—Price *S.* 10.

The Mind.—A monthly Journal of Science, Philosophy and Religion, edited by John Emery McLean; published by *the Alliance Publishing Company*, 19 *and* 21 *W.* 31*st Street, New York, America.*—Annual subscription $ 2.

The Law of Meetings, by George Blackwell, published by *Butterworth and Co.*, 7, *Fleet Street, E. C.*, *London*:—Price *S.* 2-6.

The Law of Sedition, by J. Chauduri, M.A., Bar.-at-Law, published by *The Weekly Notes Printing Works*, 3, *Hastings Street*, *Calcutta*:—Price Rs. 1.

The Presidency Small Cause Courts Act, by C. V. Visvanatha Sastri, B.A., B.L., and K. Krishnama Chariar, B.A., B.L., published by the *Vyjayanti Press*, *Mount Road, Madras*:—Price Rs. 1-8.

The Albany Law Journal for February (*in exchange*).
The Calcutta Weekly Notes for February (*in exchange*).
The Allahabad Weekly Notes for February (*in exchange*).
The Green Bag for February (*in exchange*).
The Canadian Law Times for February (*in exchange*).
The Harvard Law Review for January and February (*in exchange*).
The Canadian Law Journal for February (*in exchange*).
The Educational Review for February (*in exchange*).
The Medico Legal Journal for December (*in exchange*).

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The Sedition Act:—The Government has at last succeeded in passing its sedition law. The whole Native and Anglo-Indian communities opposed the measure. Responsible members of Government ridiculed the opposition. One high placed official said he wanted a strong weapon in the armoury of Government. Another made fun of the stupidity of the opposition in pretending to be able to influence the Government. Mr. Chalmers stated in his opening speech on the occasion of the introduction of the measure that it was the enactment of the English law. At the time of the passing of the measure when it had been shown that his Bill was not the English law, he turned round and said that that law would not suit the circumstances of this country. The Anglo-Indian community is told that the Government alone is responsible for the good government of the country and they knew better what sort of law was needed in the present circumstances of the country. We are assured at the end that the Government only wanted a giant's strength and they would not use it like a giant. Can we suppose, that the Government that could not keep their heads cool over the murder of one European officer or two by some ignorant and foolish man who had absolutely no connection with the rest of the community, can be trusted to keep within the limits of moderation and sound judgment when a cry comes from any quarter to enforce the law that is enacted? We think the Sedition Act is a most unhappy measure and a more suicidal step was never taken by the Government of this country.

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The Madras Advocate-General:—Intelligence has at last been received of the appointment of an Advocate-General direct from England in preference to the distinguished lawyer who has been doing the duties of that office. It would have been an act of singular political wisdom of which perhaps the present Government is incapable if the Hon. Mr. Bhashyam Aiyangar had been confirmed in his place. It would certainly have been an act calculated to promote the best interests of Government; and an Advocate-General second to none that has ever preceded him in the office and probably superior to most of them would have been secured for the service of Government. A late distinguished Judge of the Madras High Court who knew Mr. Bhashyam Aiyangar only as he was 15 years ago and had seen Mr. John Bruce Norton and Mr. John D. Mayne in their best days at the bar, in a letter to a friend in Madras, wrote about Mr. Bhashyam's appointment as Advocate-General, "I was rejoiced to see Bhashyam Aiyangar's appointment as Advocate-General. There has never been an abler man at the Madras Bar in my judgment." We are having instead a lawyer from England unacquainted with any of

the Indian enactments and a stranger to the Revenue history of the country or the usages and customs with reference to which he is likely to be called upon to advise. It is not like the appointment of a Judge who will have both sides placed before him by competent lawyers before he is called upon to pronounce his judgment, in which case general legal attainments of a high order would be a sufficient qualification. If the new man be barely equal to the duties of his office without landing the Government in blunders of one kind or another at the beginning of his career, this is the best we are entitled to hope. We venture to think that if the opinions given by Mr. Bhashyam Aiyangar during his one year's incumbency of the office be collected, they will show better judgment and greater knowledge and research than those of any of his predecessors for a corresponding period. We do not say this in dispraise of Mr. Arnold White; for we know nothing against him. But we cannot but think that the Secretary of State, or as we are informed, the Government of India has committed a serious mistake in the supersession of Mr. Bhashyam Aiyangar.

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Disposal of Miscellaneous cases in the Madras High Court:—With the advent of our present Chief Justice commenced the period of quick disposal of criminal cases. No criminal case, as a rule, is pending for more than five months in the High Court of Madras. But execution and other miscellaneous appeals and civil revision petitions under the Small Cause Courts Act and S. 622 of the Civil Procedure Code were much neglected and were pending for a year generally and sometimes two years. This was really bad. As remarked by *Sir Barnes Peacock*, the troubles of a litigant in India begin after he obtains a decree. But within the last six months a change has come over this and the great attention devoted to the disposal of miscellaneous cases has reduced the arrears under that head very greatly and we believe that no miscellaneous case is now allowed to be pending for more than six months. Even speedy injustice is sometimes better than tardy justice. We are of course obliged to the Chief Justice for this improvement in the disposal of miscellaneous cases.

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Sittings in the Madras High Court:—We would respectfully draw the attention of the Chief Justice of Madras to the great inconvenience caused to the parties and practitioners by the arrangements made by His Lordship as regards the sittings of the Judges. In Calcutta and Bombay, the sittings are arranged for whole months, so that all interested

are in a position to form an approximate idea as to what kind of business will be taken up by the Court and when particular cases are likely to be reached. In Madras, however, it is next to impossible to know except late on the previous evening when a case is likely to come on. The sittings are arranged only for a week and they are frequently modified from day to day during the course of the week itself. This entails great difficulty in the preparation of cases; for one has to be ready in a very large number of cases at the same time in the expectation of any one of them being taken up the next sitting. As this is extremely difficult, the parties have necessarily to suffer by the insufficiency of the preparation. Again cases come on for hearing at such short notice that practitioners are not able to avail themselves of the instructions of their clients who have to be telegraphed for from long distances, and parties whose places of residence are at considerable distance from the railway station or have to perform several days' journey before reaching the Presidency town, are not in a position to give instructions to their lawyers. There is another source of inconvenience which adds heavily to the expense of the parties in the frequent changes in the sittings and the nature of the work allotted. Let us suppose a regular appeal posted before a Bench is not reached on the date for which it is posted. It may be that that Bench does not sit again for a week or a fortnight, or it does not do regular appeals. Then the party has to go back to his place and return against the day when it is posted again. Now it may be that the case gets lower down in the list, earlier cases having been got ready in the meantime. It is the experience of almost every practitioner in Madras that in the more important cases a client has to perform his journey to Madras from half a dozen to nearly a dozen times before the case is actually heard. The Chief Justice has set his face strongly against the practitioner handing over a part-heard case or a case that has come back after the return of the findings called for, and the Chief Justice is generally averse to passing over cases for the convenience of a practitioner engaged in another court. But the difficulty of handing over a case which you learn to be posted only the previous night, especially if the records happen to be bulky, is almost insuperable. If he were only able to realize a tithe of the difficulties felt by the parties and practitioners, we feel sure he would be inclined to apply the remedy. Things were not so bad some years ago even during the time of the present Chief Justice. It may be that the work on the Original Side causes a certain amount of dislocation in the arrangements, but any difficulties arising from it can be easily surmounted. We understand that representations were made to the Registrar to bring the inconvenience to the notice of

the Chief Justice. Much of the incovenience felt by the public is shared by the office itself in getting ready cases of one class or another at a moment's notice. We can easily suggest an arrangement of the sittings which will meet all the difficulties and will be welcomed by everybody concerned. The sittings should be issued for 2 or 3 months at the same time. Taking the present number of judges, when three appellate Benches sit, one Bench may do only regular appeals week after week, another second appeals in the same manner, and a third Original Side appeals, City Civil Court appeals, criminal cases and miscellaneous cases. This arrangement may be modified on Mondays when the third Bench may be split and one of the judges sit in the Insolvency Court and do the settlement of issues and other admission work on the appellate side. When there is a sufficient amount of work on the Original Side to occupy two judges for a fortnight or a month, there need only be two Benches on the appellate side, the second of which may do first appeals one week and second appeals next week. When two judges are sitting on the Original Side, no original side appeals need be taken by the appellate benches. The important thing is that the sittings should be long and continuous. Everybody will have sufficient notice of the nature and amount of the work and can adjust his other arrangements to suit the sittings previously arranged. We would strongly impress upon the Chief Justice the desirability of clearing of the present confusion, in the interests of all concerned. We cannot doubt that if the other Judges be at all consulted by his Lordship, their opinion will decidedly be in favour of our suggestion. The whole body of mofussil clients will vote to a man in favour of it. And the office will only be too ready to fall in with it. Whose interest then can it be to uphold the present confusion?

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The Law of Railway seats:—A judgment of much interest on both sides of the water, because it constitutes a precedent in the law of railway seats, was recently delivered in London. It appears that a gentleman travelling from London to Hastings had occasion to leave the carriage at Tunbridge Wells, and took the usual precaution to reserve his seat by leaving therein his umbrella and newspapers. While he was absent another passenger seized his place and refused to vacate it until forcibly ejected. The ejected passenger brought an action against the original owner of the seat, and the latter entered a counter-claim for similar damages. The claim for damages for ejectment was dismissed and the counter-claim allowed, the court holding, in effect, that the universal mode of retaining a seat in a railway carriage is a most reasonable and convenient one. By no means the least important point in the judgment referred to is the court's assertion that a holder of a seat is privileged to use reasonable force to eject an intruder.—*The Albany Law Journal.*

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The late Sir Frank Lockwood:—The English papers are full of stories of the late Sir Frank Lockwood whose untimely demise has already been noted in these columns. The Daily Telegraph says that his first appearance in the Chancery Division occasioned much surprise to the learned judge who was presiding. "What brings you here, Mr. Lockwood?" he said. Nothing abashed by so unfamiliar a question, Sir Frank looked at the outside of his brief, and replied in a matter-of-fact way. "Three and one, my lord, merely three and one," alluding, of course, to the number of guineas marked on his brief as regards the first amount, and the smaller sum having reference to the conference fee. After successfully defending a prisoner in the Criminal Court, who had put forward a very satisfactory *alibi*, Sir Frank went for a walk in the circuit town, and during his perambulations he met the judge who had presided. Addressing him, the learned judge said: "Well, Lockwood, that was a very good *alibi*." "Yes, my lord," was the answer; "I had three offered me, and I think I selected the best." Unlike many persons whose "impromptus" require apparently a long period of incubation, Sir Frank Lockwood's genius was essentially ready to the occasion. A good sample of this faculty is afforded in connection with a case where a director of some doubtful company was being cross-examined. He was giving evidence bearing upon a rather shady history, when Sir Frank put the question to the promoting director: "Now, tell me, Sir, when did you first determine to float this company?" "Float this company?" asked the witness, with some surprise; "I don't know what you mean by 'floating' the company." "Very well, then," replied Sir Frank, "I will make my meaning perfectly clear. By floating the company I refer to the operation which almost invariably precedes the sinking of a company. Do you understand me now?" This illustration evidently impressed the witness sufficiently, and during the remainder of his evidence he was disconcerted to such a degree that he fell an easy victim to the skill of the experienced lawyer. The St. James' Gazette adds that Sir Frank was fond of telling stories against himself. "I was defending a man at York once who was accused of stealing cattle—'beasts' they call them up there. I said to a witness: 'Now, my man, you say you saw so-and-so; how far can you see a beast to know it?' 'Just as far off as I am from you,' he replied instantly, amidst roars of laughter all over the court." Once he went to a religious meeting at which Judge Waddy, a circuit friend, was speaking. Mr. Waddy thought the visitor looked cynical, and turned the tables by saying: "Now, my dear friends, Brother Lockwood will lead us in a hymn."—*The Albany Law Journal.*

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We take the liberty of extracting the following from an interesting annual address delivered by President Whitaker in the New York State Bar Association.

The Prevalence of the crime of Perjury.

"In closing I desire to say a few words upon what I consider the greatest existing evil in the administration of justice, the prevalency of the crime of perjury in legal proceedings, and to make one or two suggestions towards a partial remedy. The profession, I believe, generally concedes that perjury is at the present time the most prevalent and dangerous crime—and the most seldom punished. It has come to such a pass that men standing high in the community apparently think nothing of swearing falsely to pleadings in order to delay and defeat justice. Most of this false swearing to pleadings is made safe and possible by the use of that great perjury-begetting provision of our Code which allows allegations upon information and belief, and denials upon want of information or belief. But in addition to swearing falsely to affidavits and pleadings, many men have no regard at all for the sanctity of an oath administered in a court of justice. To such men the actual defeat of justice, if it be to their pecuniary benefit, is viewed with complacency, even though effected by perjury. I think it is the observation of judges and of practising lawyers that the crime of perjury is committed in some form or other in at least five out of every ten litigated cases. After talking to many lawyers and judges upon the subject, this is the lowest estimate I have received. When we consider the thousands of litigated causes that are tried in our State each year, it is simply appalling. It is an awful, but I believe a true, confession: It is a shame on our profession and a disgrace to our nineteen centuries of Christian civilization.

"Were David now alive, he might again exclaim, 'All men are liars.' The cause of the increase and prevalency of perjury is not hard to find. It arises largely from a weakening in the belief of future punishment, and an apparent certainty of freedom from present punishment. The chief test of the obligation of an oath is based upon a belief in future punishment, as is evidenced by the form of the oath and manner of its administration, as recognized by law. If, therefore, we eliminate all idea of future punishment for perjury, and inflict no present punishment, or, in other words, abolish all punishment, both here and hereafter, it is not to be wondered at that the crime will prevail, and that men will not hesitate to commit it to further their interests. For punishment is the great deterrent to crime. From the year 1830 to 1896 there have been on an average three convictions a year for perjury. And during the last two years only one conviction. The crime is increasing, and the punishment decreasing. Unless the commission of the crime of perjury be checked, the enforcement of rights or prevention of wrongs through the administration of the justice will become a farce. Can the commission of perjury be checked, and how? Most emphatically yes; by the bench and bar; by the judges directing

investigation to be made by the district attorney in all cases tried before them, when they have reason to believe perjury has been committed and can be proved. And by members of the bar simply being honest and true to their profession. "If the lawyers of this State would positively discourage false swearing on the part of their own clients, and honestly endeavor to have it punished when committed by the clients of their adversary, the crime would grow suddenly less. It is the professional duty of every lawyer to do this. He owes it to himself; he owes it to his fellow-man; he owes it to his country, and he owes it to his God. In populous counties there should be a department in the office of every district attorney devoted entirely to the prosecution of the crime of perjury, where lawyers who desire to do their duty could take such cases";—*The Albany Law Journal.*

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Attachment of a Scholarship:—The question of what forms of property may be taken in execution of a judgment has been presented in a new form in the recent case of *Cleveland National Bank* v. *Morrow*, 42 S. W. Rep. 200 (Tenn). A perpetual scholarship had been conferred upon the defendant by vote of the corporation of a college. The defendant had been a benefactor of the college and in acknowledgment of his favors, the college gave him the right to keep one scholar appointed by him at the institution to enjoy gratuitously all its advantages. This scholarship was attached under a decree in equity, and sold by a master in chancery for the benefit of the creditors of the defendant; and the question arises whether this attachment should have been permitted. No direct authority, strangely enough, is to be found upon the point. The question, however, is important, and may have a wide application; for if the attachment is to be allowed in this case, similar rights as for instance, the right to appoint a patient to a free bed in a hospital, would also become subject to transfer in this summary manner

The Supreme Court of Tennessee decided that the attachment in question was improper and principle and policy support this view. What cannot be assigned, obviously cannot be taken in execution; and no right dependent upon the personal character of the holder can be assigned. For this reason a power of appointment to charitable uses under a will cannot be assigned; for its exercise demands an effort of judgment on the part of one particular person. *Doyley* v. *Attorney-General*, 4 Vin. Abr. 435. In applying the principle to the present case it is unnecessary to decide the exact nature of the college's liability. Whether the obligation be looked upon as a binding agreement on the part of the college, a revocable offer, or a gratuitous promise, the right or privilege conferred is in any case inseparably joined with the personal characteristics of the person intended to make use of it. So long as it lives in him he can no more transfer it to another than he can transfer his own mind. The college conferred the power upon him in reliance

upon his personal judgment in making the appointment. No proposal was made for taking a scholar not designated by this one particular person; and gross injustice might be done if the college were forced to accept the choice of another person who may have nothing to recommend his judgment apart from the fact that he is a creditor of him who was first intended to exercise the power. The conclusion is inevitable, that the privilege of appointment under this scholarship is a personal matter, not assignable, and hence not properly subject to attachment;—*Harvard Law Review.*

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Torts—Allurements to Children.—A waterworks company maintained upon its grounds a reservoir of water, attractive to small boys, who, to its knowledge, and without objection on its part, were accustomed to resort there. *Held*, that if the company took no reasonable precautions to prevent accidents, and one of the children, without negligence on his part, fell in and was drowned, the representatives of the deceased might recover damages from the company for his death. *Price* v. *Atchison Water Co.*, 50 Pac. Rep. 450 (Kan).

The court shows a tendency to take the untenable position that a failure to object to the entry of the boys on the land was equivalent to an express permission to them to come, but in general the opinion follows the line of argument in the Turntable cases, laying down a special rule for infant trespassers. *Keffe* v. *Mil & St. P. R. R. Co.*, 21 Minn. 207. In the majority of cases where the cause of injury has been a reservoir of water, as above, an opposite conclusion has been reached, some of these decisions being in jurisdictions which allow recovery in the Turntable cases. *Peters* v. *Bowman*, 115 Cal., 345. There would seem, however, to be no distinction on principle between the two classes of cases. In the principal case the deceased had been repeatedly warned of the danger, and was apparently of such an age as to understand that it was wrong for him to go on the defendant's land; this would place him in the position of an adult trespasser and would justify a different result:—*Harvard Law Review.*

REVIEWS.

The Indian Penal Code, by R. A. Nelson, Bar.-at-Law, Second Edition, published by Messrs. Srinivasa Varadachari & Co., Madras:—Price Rs. 8. We have received a copy of the second edition of Mr. Nelson's book on the Indian Penal Code. The author has made considerable additions to the first edition and the notes have been brought up to date. The book is likely to be

found useful by students preparing for the law examinations. Mr. Mayne's Commentaries undoubtedly hold the first place among all the works on the Indian Penal Code, and we can recommend Mr. Nelson's book as a carefully prepared analysis of the sections and of Mr. Mayne's commentaries.

The Elements of Mercantile Law, by T. N. Stevens, Second Edition, (1897), published by *Butterworth & Co., 7, Fleet Street, London*:—Price 10-6. This is an elementary book upon the branches of law which are usually dealt with under the head of Mercantile Law. The book is not intended to replace any of the established text-books upon the Law of Contracts in general, like those of Pollock and Anson, or any of the special treatises dealing with particular kinds of contracts. The book is well fitted to serve as an introduction to the larger treatises upon the various subjects of Mercantile Law. The leading principles of the subjects are presented within a very small compass in a clear and simple style. Part I of the book gives a general view of the Law of Contracts and Part II, of Sale of Goods, Agency, Negotiable Instruments, Partnership, Insurance, Carriage, Suretyship and Guarantee, and Shipping and Bankruptcy. There are portions of the book which admit of some improvement. In giving the essentials of a contract, the author states that a proposal and an acceptance are necessary to every contract. This view is no doubt adopted in the Indian Contract Act, but as pointed out by Sir Frederick Pollock, there are several cases where this analysis can be said to be applicable only by recourse to fiction. The distinction between void and voidable contracts is not pointed out; and it is rather a serious omission. But it is perhaps too much to expect anything like a complete view in such an elementary work.

The Judicial Trustees' Act of 1896 *with notes*, by Gerald John Wheeler, M.A., LL.B., published by *Butterworth & Co., 7, Fleet Street, London*:—Price S. 10. The Judicial Trustees' Act of 1896, proceeds mainly on the lines of the Scottish Act by which judicial factors are appointed. Mr. Wheeler has done a very useful and timely service to the profession in publishing the Judicial Trustees' Act with notes including notes of the cases decided in Scotland under the corresponding Act. The author has also given notes on the appointment of, and the duties attached to, the office of Public Trustee in the Colonies. We have pleasure in recommending the book to the profession.

The Madras Law Journal.

PART III.] MARCH 1898. [VOL. VIII.

SUCCESSION OF COGNATES UNDER THE MITAKSHARA.

II.

In page 699 of his book on Inheritance, referring to the diagram therein given, Sarvadhikari re-affirms the same proposition evidently forgetting that if *Satatapa's* text is to be taken as exhaustive of the lines through which alone the connection of heritable *Bandhus* should be established, *Bandhus* in one's own descending line who are his nearest *Bandhus* will have to be excluded as none of the nine *Bandhus* is in his own descending line.

At page 702 he brings together all the texts of the Mitakshara upon which the heritable rights of the *Bandhus* is based and by which their order of succession is regulated, and at pages 704 and 705 he mentions the ancestors from whom descent should be traced; but at page 706 he lays down a rule of exclusion reiterating that cognate descendants of each of the classes are excluded from inheritance when (1) the deceased or (2) the deceased's ancestor is not in the line of the maternal grandfather either of the deceased or of the deceased's father or mother, and that a cognate ascendant of the deceased is also excluded when he does not belong to the line of the maternal grandfather of the deceased or of his father or mother. He thereupon frames three tables of *Bandhus* under the Mitakshara in a sheet between pages 712 and 713 in which I, split into Ia and Ib, shows one's own cognate kindred *ex-parte paterna* and *ex-parte materna*, and II shows *Pitru-bandhus*, father's cognate or cognate through the father, and III shows *Matru-bandhus*, mother's cognate or cognate through the mother. In these tables Ia, Ib, II

and III the father's paternal aunt's son is included in the first class Ia and marked S_1, the son of B's daughter. The maternal uncle is included in the first class in table Ib and marked X_1, the son of A, the father of the mother m. One of the most formidable objections to the construction of these tables that presents itself at the very outset is that the father's paternal aunt's son who is expressly included in the second class of *Bandhus* in *Satatapa's* text is elevated by Sarvadhikari to the first class high up and higher than the maternal uncle's son who is in the first class. Sarvadhikari of course is fully aware of the weight of this objection and tries to get over it at page 727 as follows:—"It would seem at first sight "that the father's father's sister's son should according to Mitakshara "be postponed to the maternal aunt's son, etc., and the mother's "father's sister's son to father's *Bandhus*. A little consideration, "however, will show that such could not have been the meaning of "Mitakshara. Both father's paternal aunt's son and the mother's "sister's son are two degrees removed from a common ancestor. "But the common ancestor is an agnate *Sapinda* in the one case and "a cognate *Sapinda* in the other. According to the general principle "of succession in the Mitakshara law a cognate descendant two "degrees removed of an agnate *Sapinda* should be preferred to a "cognate descendant two degrees removed of a cognate *Sapinda*. "It should be remembered that when we apply the rule of propinquity we should be careful in noting that the degrees of "propinquity are counted in ascending lines not from the propositus, but from a common ancestor from whom the line diverges. "This is the Hindu idea of propinquity and is materially different "from the western idea of nearness. Within a well-defined range "the degrees of *Sapinda* relationship are allowed to be heritable "and the distance from the common ancestor is the test of propinquity. If the system of computing the degrees of kindred "obtaining in the west be applied to the Indian system, it will "upset all the principles regulating Hindu succession and will make "confusion worse confounded. The principle of computing these "degrees has already been explained to you and if you apply that "principle in the case before you, you will find that even by the "rule of affinity and propinquity, the father's paternal aunt's son "should take precedence of the mother's brother or the mother's "sister's son."

The subsequent remarks also ending with page 735 may with advantage be referred to. The fallacy on which the whole reasoning is based in the above extract is easily exposed. He says that the author of the Mitakshara could not have really meant what his language clearly imports. He says that the father's paternal aunt's son and the mother's brother's son are two degrees removed from a common ancestor. The first observation to be made here is that the common ancestor of the propositus and of his father's paternal aunt's son is one person, and the common ancestor of the propositus and of the mother's brother's son is quite a different person. No doubt the two claimants are two degrees removed from the respective common ancestors; but the propositus is four and two degrees removed from the respective common ancestors. Here, therefore, is a case in which the propositus and the adverse claimants are not descended from a common ancestor. No doubt if they are all descended from a common ancestor and the claimants are equally removed from that ancestor who is an agnate *Sapinda* to the one and a cognate *Sapinda* to the other, the proposition advanced by Sarvadhikari may hold good; but when the common ancestors are different and the adverse claimants are both cognate *Sapindas* of the propositus, though the adverse claimants may be equally removed from the respective common ancestors, the propositus is not removed an equal number of degrees from the respective common ancestors; for, the common ancestor of himself and his father's paternal aunt's son is three degrees removed from him, but the common ancestor of himself and his maternal uncle's son is only two degrees removed. In other words the maternal uncle's son is a descendant two degrees removed from the common ancestor who is two degrees removed from the propositus, and the father's paternal aunt's son is also two degrees removed from a common ancestor who is three degrees removed from the propositus.

Subject to what may be urged on the score of the former being the cognate ancestor of the propositus and the latter being an agnate ancestor, there can possibly be no doubt that of the two collaterals one of whom is descended of a nearer ancestor and the other of whom is descended from a remoter ancestor, both being equally removed from the respective ancestors, the former certainly is nearer of kin to the propositus than the latter.

Let us now consider how this can be affected by the fact that the paternal great-grandfather is an agnate and the maternal grandfather is a cognate of the propositus.

Sarvadhikari says that under the Mitakshara Law a cognate descendant two degrees removed of an agnate *Sapinda* should be preferred to a cognate descendant two degrees removed of a cognate *Sapinda*. What is the general principle of succession on which the above rule is founded he does not attempt to explain; but the principle he refers to must be that, under the Mitakshara, agnates, however remote, are preferred to cognates, however near. But as between cognates themselves each of whom *ex-hypothesi* is not an agnate of the propositus, there is nothing whatever in the Mitakshara law or the principle of affinity or propinquity which would give priority to a cognate descendant of an agnate ascendant over an agnate or a cognate descendant of a cognate ascendant. Under the Dayabhaga Law no doubt the principle is that among those who offer oblations of the same kind, one who offers them to the paternal ancestors is preferred to one who offers them to the maternal ancestors of the deceased. According to this the father's paternal aunt's son is preferred to the maternal uncle. If, however, Mr. Mayne is right in suggesting that this rule of preference cannot prevail if the number of oblations offered by the respective claimants in which the propositus participates is unequal, it is by no means clear why even under the Dayabhaga Law the maternal uncle should be postponed to the father's paternal aunt's son. Mr. Mayne also adds that if the principle be that a man who presents a greater number of oblations to persons who are maternal ancestors of the propositus is inferior to one who presents a lesser number to persons who are the paternal ancestors of the propositus, then the principle is undoubtedly disregarded both by the Dayabhaga and the Dayakrama Sangraha.(1) If, however, it only goes to this extent that where the number is equal, those who present offerings to the paternal ancestors are preferred to those who present them to the maternal ancestors, then the whole course of descent is logical and consistent. The priority, therefore, given to the father's paternal aunt's son over the maternal uncle by the Dayabhaga School is not the result of

(1) Mayne's Hindu Law and Usage and pr 536.

the operation of any general rule or principle of spiritual benefit, but the result of express provision made to that effect in chapter XI, section VI, placitum 12 of Dayabhaga,(1) though no doubt the author bases it on the theory of religious efficacy. However this may be, it is not pertinent to a consideration of the question arising under the Mitakshara School.

In the illustration given by Sarvadhikari, he refers to what according to him is an apparent postponement of the father's paternal aunt's son to the maternal aunt's son of the propositus, and states that both are two degrees removed from a common ancestor and the descendants are cognate descendants of the two ancestors. He includes the maternal uncle and his son in the *etc.*, after the maternal aunt's son, and in the illustration as given above, the mother's brother has been substituted for the mother's sister. If you take the maternal uncle, he is the *agnate* descendant one degree removed of the maternal grandfather of the propositus, *i.e.*, a cognate ascendant two degrees removed; and the father's paternal aunt's son is a *cognate* descendant *two* degrees removed of the father's paternal grandfather who is an agnate ascendant three degrees removed from the propositus. As already explained, when one is an agnate *Sapinda* of the propositus, however remote, extending it may be to the farthest limits of *Samanodakas*, he has priority over the nearest cognate-*Sapinda* removed, it may be only two degrees from the propositus, on the ground that the propinquity in the former case is greater by reason of the transmission of corporeal particles through an unbroken male line. If, therefore, the maternal uncle be opposed by the father's paternal uncle's son instead of the father's paternal aunt's son, the maternal uncle will be nowhere. But the father's paternal aunt's son is no more connected with the propositus by an unbroken male line than the maternal uncle and his sons.

In the case of the father's paternal aunt's son the particles of the common ancestor have no doubt been agnatically transmitted to the propositus, but not so to his daughter's son, *i.e.*, the father's paternal aunt's son. In the case of the maternal uncle the corporeal particles of his father, the common ancestor, have been directly transmitted to his son, *i.e.*, the maternal uncle, but not so to the

(1) Stokes' H. L. B., p. 346.

propositus who is his daughter's son; and even if you take the maternal uncle's sons, it will be the same, the uncle's son being one degree further removed but in the agnate line. When, therefore, you have to determine the relative propinquity of the maternal uncle and the father's paternal aunt's son, the fact of the common ancestor being an agnate ascendant in the one case and a cognate ascendant in the other case cannot affect the principle of propinquity, because the collateral descendant of the common ancestor is a cognate descendant in the one case and in the other case he is an agnate descendant, though it would not make any difference if the latter also were a cognate descendant as in the case of the mother's sister's son, the cognate mentioned in the illustration given by Sarvadhikari. A moment's reflection as to what constitutes affinity, without of course ignoring the principle of Mitakshara, that propinquity is greater between the most distant agnates than between the nearest cognates, will make the matter clear. If you have to determine which of two cognates descended from the propositus or from one and the same ancestor of the propositus is nearer of kin, there will be no difficulty, because the one that is further removed from the propositus in the one case or from the common ancestor in the other case will have less of community of particles with the propositus than the other. But when the two are not descended from the propositus or from a common ancestor of the propositus but from two different ancestors of the propositus, the test of propinquity is to see whether in common between the propositus and one claimant, there is greater community of the particles of the common ancestor than there is between the propositus and the other claimant in respect of the particles of their common ancestor. In other words the question is which of the two ancestors has transmitted the greater proportion of his corporeal particles in common to the respective descendants, *viz.*, the propositus and one claimant on the one hand and the propositus and the other claimant on the other.

If the agnatic connection be intercepted by the intervention of a male who is a stranger to the family, it is immaterial whether that stranger be interposed in the ascending line of the propositus or in the descending line of the common ancestor, the affinity in either case is kept up, though in an attenuated degree, by a

female member who may be either in the ascending line of the propositus or the ascending line of the claimant. When viewed from the standpoint of the propositus, his father's paternal aunt's son is a cognate descendant of an agnate ascendant. But when viewed from the standpoint of the father's paternal aunt's son, the propositus is an agnate descendant of a cognate ascendant. Similarly, in the case of the maternal uncle, from the standpoint of the propositus, he is an agnate descendant of a cognate ascendant, and from the standpoint of the maternal uncle, the propositus is a cognate descendant of an agnate ascendant. The moment the agnate connection is interrupted, it is perfectly immaterial in the determination of propinquity whether it was interrupted in the ascending line of the propositus or in the collateral line or in both. That such was the view taken by Mitakshara is clear from the enumeration and classification of the nine *Bandhus*. Sarvadhikari says that when applying the rule of propinquity "we should be careful in noting that the degrees of propinquity are counted in ascending line not from the propositus but from a common ancestor from whom the line diverges. This is the Hindu idea of propinquity and is different from the western idea of nearness."

This is again altogether fallacious and is the result of misapplying the rule laid down in the definition of *Sapinda* for determining whether a collateral is or is not a *Sapinda* of the propositus to the determination of quite a different question, *viz.*, which of the two collaterals, both of whom are *Sapindas* to the propositus according to the said rule, is nearer of kin. The said rule is that in counting five degrees on the mother's side and seven degrees on the father's side, you must count it from the common ancestor from whom the line diverges when you have to find out whether a collateral in that diverging line is or is not a *Sapinda*. That is to say a collateral is a *Sapinda* if he is not more than five degrees removed from a common ancestor on the maternal side of the propositus or seven degrees removed from a common ancestor on the paternal side of the propositus. Sarvadhikari in referring to the western mode of computation is evidently referring to the civil law which is followed by the English law. According to Canon Law(1) the degree of relationship between two collaterals is expressed by

(1) Williams on Executors, Vol. I, p. 357, Ed. of 1893, para. 127. Lindley's Study of Jurisprudence, Ed. of 1879,

the number of degrees by which the remoter of them is removed from the common ancestor; and the Hindu mode of computation for determining the existence of *Sapinda* relationship between two collaterals is analogous to this. But in determining the relative degrees of propinquity to the propositus of two competing *Sapindas*, there is and can be no difference between the western and the eastern idea of nearness subject of course to such peculiarities as may be due to the difference in the classes of heirs under the two systems of jurisprudence; and it will indeed be strange, if under the Canon Law it were otherwise, *viz.*, a claimant, his father and grandfather 5, 4 and 3 degrees respectively removed from the common ancestor were of equal kinship to the propositus, 7 degrees removed from the common ancestor. Taking, for instance, agnates, how are we to determine which of two agnates of the same class is nearer of kin except by adding the number of degrees as under the Roman system. No doubt agnates may be grouped into different classes of heirs with reference to their being in the ascending line, the descending line, the nearer (*Sapindas* of the Bengal School) the remoter (*Sakulyas* of the Bengal School), and the remotest (*Samanodakas*). But when there is a competition between agnates of each class, their relative degrees of propinquity can be determined only by counting the number of degrees from the propositus to the claimants through the common ancestor or respective common ancestors. This is simply a rule of common sense and not peculiar to any system of jurisprudence, whatever other differences may exist in regard to the agnates, cognates and different classes of heirs. Among cognates of each class the degree of propinquity can be ascertained only in the same way. If two cognates are in two different classes of cognates, no computation of degrees is necessary. As already stated the maternal uncle's son and, therefore, *a fortiori*, though inferentially, the maternal uncle are included in the first class and the father's paternal aunt's son in the second class. There can, therefore, be really no competition between the two as the first class expressly excludes the second class; and even if they should be regarded as being in the same class, *viz.*, cognates without any classification of them into groups, the maternal uncle is four degrees removed from the propositus while the father's paternal aunt's son is six degrees removed from the propositus. The ceremonial law of the Benares School, according to which in the performance of funeral

obsequies and the *Sradha* or annual ceremony of the deceased the maternal uncle and his sons have decided precedence over the father's paternal aunt's sons, affords cogent proof that according to the doctrine of the Mitakshara School the former is nearer of kin to the deceased than the latter.(1) In spite of all the assumptions made by Sarvadhikari and the elaborate and ingenious dissertation on the system of *Bandhus* under the Mitakshara and the attempt to unravel the hidden meaning of the Mitakshara, he is fully alive to Satatapa's text and the commentary thereon by the author of the Mitakshara staring him in the face. He makes the most audacious but futile attempt to retranslate the text, after, as he himself frankly admits, interpolating three words, *viz.*, "etc.," "heirs" and "like." The translation will be found set forth at page 731. But unfortunately even this interpolation and retranslation have not the desired effect. The substance of the text according to his translation is that cognates of the first class must be reckoned as heirs like the cognates in the second class. Just like the cognates in the second class must be reckoned as heirs, the cognates of the third class must be reckoned as heirs. He then begins to annotate his fresh translation at page 732 in a manner most unintelligible and meaningless. Even if one should accept his retranslation and pardon the translator for interpolating in the original three small words, there is nothing in it which would displace and transfer the nine *Bandhus* or any of them from one class to another and the classification remains as intact as in the original translation. Being fully conscious of the futility of his effort to find something in the Mitakshara which does not exist in it to support his preconceived theory and prejudice derived from the Bengal School, he attempts to suggest "another probable explanation of the words 'the father's paternal aunt's son' and 'the mother's paternal aunt's son' occurring in the second and the third series instead of in the first. The explanation is "that the first series may be taken to represent the *Bandhus* through the father and the mother. The second series may be taken to represent the *Bandhus* through the father's paternal and maternal ancestors; and the third, the *Bandhus* through the mother's paternal and maternal ancestors. The members of the first series are heirs in the first instance. In default of them, the members of the second series, and in default of them,

(1) Sarvadhikari, p. 115.

those of the third." So far Sarvadhikari is certainly right and no exception can be taken to his statement. He then says that "the father's paternal aunt's son is connected directly through the father and mediately through the father's grandfather and thus he is the owner's own *Bandhu* as well as the *Bandhu* of his father and thus bears a double relation." Though this is loose and vague, it really does not affect the question at issue. If Sarvadhikari means that the double relation he bears is that he is the *Atma-Bandhu* or the first class *Bandhu* of the father, but that he is a *Pitru-Bandhu* or the second class *Bandhu* of the propositus, he is certainly right. But what he really means it is not easy to conjecture. He then winds up by saying, "as the owner's own *Bandhu ex-parte paterna* the father's paternal aunt's son has already been acknowledged as an heir of the first class ...."

"The father's paternal aunt's son then is included in the second series simply because he bears a double relation. He partakes of the heritable qualities of the first class as well as of the second class." Why on earth he should not be included in the first series if he is really entitled to come in as an heir of the first series (*Atma-Bandhus* of the propositus) it is simply impossible to conceive. The fact of his bearing a double relation, *viz.*, of his being not only a *Pitru-Bandhu* of the propositus but also an *Atma Bandhu* of the father is no reason for degrading him to the second class when succession has to be traced to the propositus. It is because he is an *Atma-Bandhu* of the father that he finds a place in the second class and because he is not an *Atma-Bandhu* of the propositus he finds no place in the first class. In conclusion, however, he is frank enough to admit that his second explanation cannot be considered to be so satisfactory as the other one given by him based upon his re-translation of *Satatapa's* text.

Another recent Bengal writer on Hindu Law, Mr. Siromani, is equally anxious with Rajkumar Sarvadhikari to twist and distort the Mitakshara so as to assimilate it to the Bengal School and uphold the right of the cognates related through the daughters of the family extending to the great great-grandfather as against the cognates, the maternal uncle and the rest, who are connected with the propositus through his mother. He adopts in entirety the tables of *Bandhus* constructed by Rajkumar Sarvadhikari and the

conclusions arrived at by him.(1) But he apparently repudiates his reasoning and says that he overlooked the distinction between the words *Bandhu* and *Bandhava* which latter word occurs in the text of Satatapa and that by interpolating certain words in that text he changed its meaning altogether. He says that "though the words *Bandhu* and *Bandhava* mean one and the same thing, yet *Bandhava* literally means the son of a *Bandhu* and *Bandhava* is not unfrequently used to denote a cognate brother as we say."

The word which occurs in Yagnyavalkya's text which is the subject of *Vijnanesvara's* Commentary on the subject of inheritance is "*Bandhu,*" and the word which occurs in Satatapa's text which is cited in support of the proposition advanced by *Vijnanesvara* that "*Bandhus*" are of three classes, is "*Bandhava.*" If the author of the Mitakshara understood the word "*Bandhava*" occurring in the said text in the sense in which Siromani says that it is used, *viz.,* as denoting not *Bandhus* generally but sons of *Bandhus* or cognate brothers, he (*Vijnanesvara*) would not have cited it in support of his classification of "*Bandhus*" into three classes. At any rate he would not have relied upon it directly, but explained it by saying that, in the same way as *Bandhu's* sons are divided into *three* classes, so should *Bandhus* themselves be divided. There is, therefore, no foundation for supposing that Satatapa used the word *Bandhava* otherwise than as synonymous with *Bandhus* and much less for supposing that the author of the Mitakshara understood the word *Bandhava* in the restricted sense of cognate brothers. Siromani's conclusion is that the enumeration of the *nine Bandhus* is not simply illustrative but exhaustive of the class of *Bandhavas* in the sense in which he would have us understand that term. That Siromani is clearly wrong in considering that the text of Satatapa is an exhaustive list of *Bandhavas* or cognate brethren is obvious by the omission to specify in the third class the mother's paternal uncle's son who is as much a cognate brother as the mother's paternal aunt's son who is specified. Thus it will be seen that he wants to throw overboard the decisions of the Privy Council and of the Calcutta High Court and in fact of all the High Courts, that the enumeration in Satatapa's text is illustrative and not exhaustive, by suggesting this wire-drawn distinction between *Bandhus* and *Bandhavas* and deducing

(1) Siromani on Hindu Law, p. 322.

therefrom a theory that it is exhaustive of *Bandhavas* and that none of the persons therein mentioned is a *Bandhu*. Immediately after citing Satatapa's text the author of the Mitakshara says in placitum 2, section 6, chapter II, that the order in which the *three* classes are therein mentioned is indicative of the order in which the three classes will succeed one after another. In this view it becomes immaterial whether "*Bandhavas*" is used in the sense of *Bandhus* generally or of sons of *Bandhus*. Here the competition is between two persons specifically named in the 1st and 2nd classes respectively. At page 301 he says "cognates related through the daughters of the family should be called *Atma-Bandhus*, for there is no reason whatever for calling them father's *Bandhus*." This is simply an assumption founded on no reason or rhyme except the preconceived notion of Siromani and Rajakumar Sarvadhikari, the two Bengal writers. In the face of the express and singularly lucid text of the Mitakshara it is not only idle but too late in the day to attempt to get rid of it by some fanciful interpretation of it, or by suggesting certain speculative principles deducible from some occult intention of the author of the Mitakshara which is clearly opposed to his intention as declared.

JURISPRUDENCE.

GROUNDS OF CRIMINAL JURISDICTION.

II.

Of the several theories which have been mentioned as to the grounds of criminal jurisdiction, the only one which would appear to be based upon sound legal principles is the subjective territorial theory. The idea of sovereignty is inseparably connected with territory, and every Sovereign State has, *eo nomine*, exclusive authority within the territories owned by it. Conversely, such a State has no power within the territories of another Sovereign State. These two propositions are laid down by Fœlix (Droit Int. Privé, §§ 9 and 10), cited by Wheaton (Int. Law, § 78), in the following words:—"Every State possesses the power of regulating the conditions on which the real or personal property, within its territory, may be held or transmitted; and of determining the state and capacity of all persons therein, as well as the validity of the contracts and other acts which arise there, and the rights and

obligations which result from them; and finally of prescribing the conditions on which suits at law may be commenced and carried on within its territory.

"Secondly, no State can, by its laws, directly affect, bind or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not. This is a consequence of the first general principle; a different system, which would recognize in each State, the power of regulating persons or things beyond its territory, would exclude the equality of rights among different States, and the exclusive sovereignty which belongs to each of them."

It may be said that the exclusive territorial jurisdiction of a State gives complete control over all foreigners, while they remain on its soil, even for acts done by them before their arrival there; but this is, as Mr. Hall points out "in reality to set up a claim to concurrent jurisdiction with other States, as to acts done within them, and so to destroy the very principle of exclusive territorial jurisdiction to which the alleged rights must appeal for support." (Int. Law., 3rd Edn., p. 209).

Viewing the matter in a different aspect, we arrive at the same result. According to Lord Coke (7 Co. Rep., 6 *a*,) protection and allegiance are correlative—a doctrine which, as we have seen, was approved and emphasised in the case of *R.* v. *Keyn.* In other words, it is only for acts done when the person doing them is enjoying the protection afforded by a State, that he is amenable to its jurisdiction. Even where a subject of one State travels into another, the protection of the former ceases and that of the latter begins, although the former might solicitously watch if the full measure of such protection is afforded by the latter. It will thus be seen that the other theories are all radically defective, as violating the sovereignty of Foreign States. The theory of general supervision is adopted by so few States and under such restrictions and limitations, that there is little difficulty in dismissing it without further notice. The theories of allegiance and self-protection are, besides, incomplete, as the former is unable to account for the admitted practice of exercising jurisdiction over resident aliens, and the latter for that of punishing offences against such persons.

The self-protection and objective territorial theories are also untenable, as they are based upon a principle of international anarchy, which repudiates the existence of law and comity amongst the nations, and assume that it is necessary for each State to take the law into its own hands to punish offences against itself, its subjects, or other persons resident within its borders. The most that can be said for them is that expediency should prevail over principle. But even as regards expediency, the advocates of these theories forget that every State lies under a responsibility, well-recognized by international law, towards other States, for all acts or omissions taking place within its borders by which another State or subjects of the latter are injuriously affected. (Hall, Int. Law, p. 214). As illustrations of the express recognition of this responsibility by States, I may instance Ss. 125, 126 and 127 of the Indian Penal Code, dealing with waging war or committing depredations on Asiatic powers, and the provisions in Ch. XII. of the same Code dealing with the counterfeiting, etc., of foreign coin, as also the similar provisions of the English law. (Stephen's Digest of Cr. Law, Arts. 99—102; 372, 373 and 375.) If this responsibility is not fulfilled by a State, recourse must be had to diplomatic action to enforce its fulfilment, and if that is of no avail, to reprisals, and ultimately to war. If the offender is subsequently arrested in the State which has been wronged, after diplomatic action has failed to secure his trial in the other State, he may be tried in the former State, not, indeed, under the law, but as a matter above the law, and as an act of State or of war. Cases might be imagined in which it would be dangerous to allow one State to arrogate to itself jurisdiction over acts committed in another State, by which the former is or fancies itself to be wronged. A man may be expected to know the laws of the country in which he lives but not those of other countries; but, if these theories were to hold good, it might happen that a man in good faith doing, in his own country, what is innocent there, may unconsciously be committing an offence against another State, for which he would be liable to be arrested by its authorities the moment he unwittingly sets foot on its soil. Especially is this danger great in the case of political offences—for their category is a variable one, and they are, besides, a class of acts for which States are very jealous of abandoning their subjects to the tender mercies of other States.

The fact that the arrest of the offender immediately after the commission of the offence can take place only in the State in which he is at the time of its commission, seems to give a sort of natural right to it to try for that offence. If the State which is wronged wishes to try him for that offence, it must either request the former to extradite him, or wait until he chances to set foot on its soil. Thus the self-protection and objective territorial theories can only have a fitful and precarious operation, unless with the consent and under the delegation of the State having jurisdiction under the subjective territorial theory.

It is said, again, on behalf of the objective territorial theory, that the preponderance of testimony is to be found about the place where the offence actually takes effect. [Wharton, Conflict of Laws, p. 700, n (3).] But it ought to be remembered that in criminal law the identity of the offender and his intention are at least as important as the *corpus delicti*. Even granting that there is such a preponderance, that consideration cannot affect a matter which is otherwise clear on principle.

It is to be noted that the advocates of the other theories do not altogether repudiate the subjective territorial theory, but either do not, as we have seen in the United States, take the trouble of disposing of it at all, or, as in other countries, give play to it concurrently with the others. But the exercise of concurrent jurisdiction by two or more States, without the safeguard of a treaty, is always fraught with grave inconveniences—an indecent haste on the part of one State to seize and exercise jurisdiction and diplomatic collisions resulting therefrom; and the possibility of an offender being subjected to more than one trial for the same offence, States refusing to recognize sentences, or much more so, judgments of acquittal passed by other States.

One consequence of the subjective territorial theory is that non-resident aliens are entitled to take advantage of the criminal laws of a country, when offences are committed against them by persons resident in it. This may seem opposed to the principle laid down by the House of Lords in the case of *Jeffreys v. Boosey* (4 H. L. R., 815), where it was held that a non-resident alien was not within the contemplation of the Statute of Anne for the protection

of copyright, and could not have the benefit of copyright in a musical composition first published by him in England. This case has not only been virtually dissented from by Lords *Cairns* and *Westbury* in the subsequent case of *Routledge* v. *Low* (L. R., 3 H. L., 100) before the same House, but the decision in it turned upon the fact, in the words of *Baron Pollock*, that "copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind assembled in communities, but is a creature of the municipal law of each country to be enjoyed for such time and under such regulations as the law of each State may direct and has no existence by the common law of England." As criminal laws enforce natural rights and exist by the common law, they do not fall within the ruling in this case. For a case in which the common law right to a trademark has been enforced in India in favour of a non-resident alien see *Badische Aniline and Soda Fabrik* v. *Maneckji Shapurji Katrak*, I. L. R., 17 B., 584.

In insisting so strongly upon the exclusive authority of the subjective territorial theory, it is to be understood that the desirability of making exceptions to it by means of treaties is at the same time, fully recognized. One case, for instance, strikes me as being eminently worthy of being thus excepted—namely, where a domiciled subject of one State goes abroad just to evade a Home law and then returns to it. There may also be several other cases in which policy and expediency require that such exceptions should be made. What is urged is that these exceptions should be made under the safeguard of a treaty and not as a matter of right.

Before leaving this part of the subject, I shall cite the two resolutions passed by the Institute for International Law in 1879 upon the question of criminal jurisdiction. The first proposition, adopted by nineteen votes to seven, ran thus :—"Each State has the right to punish for acts committed outside its territory by foreigners, in violation of its penal laws, when these acts constitute an attack on the social existence of the State, compromising its safety, and *which are not cognizable by the penal law of the country where they take place.*" The second proposition "whether a State can punish a foreigner who commits abroad offences against its laws other than those designated in the previous proposition" was answered in the negative by a majority of seventeen votes to nine.

In the discussion that took place, Professor Westlake strenuously maintained that no State has under any circumstances the right to punish subjects of other States for acts committed by them outside of its territory. (Wharton, Con. of Laws, p. 697, n (1).)

As to the exercise of jurisdiction on the high seas, the practice may broadly be stated thus :—

A. With regard to merchant vessels—

1. Every State has jurisdiction over all persons, whether subjects or foreigners, on board its merchant vessels on the high seas, within or beyond territorial waters, or in any port or river. The British Merchant Shipping Act of 1894, consolidating the former Acts on the same subject, gives jurisdiction, by S. 686, over persons not being British subjects who are charged with having committed any offence on board any British ship *on the high seas.* But this is not exclusive of the common law jurisdiction over foreigners on board British vessels in ports and rivers, whether such foreigners are attached to the vessel (*R. v. Anderson,* L. R., 1, C. C. 161), or not (*R. v. Carr,* 10 Q. B. D., 76).

2. Every State has jurisdiction over its subjects on board foreign vessels on the high seas, within or beyond territorial waters, or in any port or river. By the British Merchant Shipping Act of 1894, S. 686, such jurisdiction is exerciseable when the British subject does not belong to the foreign ship: this would seem to exclude jurisdiction where he does so belong, especially as it is very doubtful whether the common law recognized any jurisdiction over a British subject on board a foreign vessel (Roscoe, Crim. Ev., p. 236).

3. Every State has jurisdiction over all vessels in its ports, harbours and rivers. But it is the distinctive practice of France, to decline to exercise such jurisdiction except in the case of "crimes or lesser offences committed upon or by persons not belonging to the crew, or even by members of it upon each other, provided in the latter case that the peace of the port is compromised." (Hall, Int. Law, p. 199.)

4. As to jurisdiction in territorial waters, it was held by the majority of Judges in *R. v. Keyn,* that there was no usage as to nations having assumed the power of making foreigners on foreign

ships passing through their territorial waters amenable generally to the local criminal law, that jurisdiction had been exercised in such places only in matters connected with navigation, or with revenue, local fisheries, or neutrality, but that there would be nothing wrong or contrary to international law in assuming such a general criminal jurisdiction by means of a Statute. Accordingly, the Territorial Waters Jurisdiction Act, 1878, was passed by the British Parliament asserting sovereignty over British territorial waters and conferring jurisdiction on British Courts over acts done within such waters. But in other countries the old practice of exercising jurisdiction only in respect of the above-mentioned matters and looking upon territorial waters in all other respects as if they were part of the non-territorial seas, continues.

B. With regard to public vessels—

Every State has jurisdiction over all persons on board its public vessels wherever they may be, while, at the same time, every State retains its jurisdiction over its subjects on board foreign public vessels. [Whether the latter proposition holds good in the case of England is doubtful.] So far there is no difference between public and private vessels. But in a port or river or in territorial waters, a foreign public vessel, although subject to the laws of the territorial State in the same manner and to the same extent as a private vessel, enjoys a certain immunity, out of courtesy to the State owning the vessel. The territorial jurisdiction is not exercised, save where the parties concerned are subjects of the territorial State, or an act done on board the vessel takes effect externally to her, or the State owning the vessel voluntarily submits to such jurisdiction. But no entry can be made into the vessel itself for any purpose whatever, without the captain's consent. If there is a violation of the territorial laws, a demand for the surrender of the guilty persons or for redress should be made to the captain and then to the State owning the vessel, followed in extreme cases by its expulsion out of the territory.

C. Every State has jurisdiction to try acts which are piracy *jure gentium* wherever and by whomsoever committed.

The principles on which the above practice is based may be stated thus. In places not within the jurisdiction of any State,

as for instance, the high seas, unless complete lawlessness is to exist, jurisdiction must be exercised either exclusively by each State over persons and property belonging to it, or concurrently with all other States over all persons and property, to whatever country they may belong. Principle and convenience point to the former as the course which is more proper. In such places, person and property are exclusively under the protection of the State to which they belong, as other States are but very little interested in what becomes of them. According to the doctrine already referred to, such State has, therefore, jurisdiction over such persons and property. In other words, each State has jurisdiction over its own subjects on board its own or foreign vessels, and over all persons, subjects or foreigners, on board its own vessels, on the high seas. It will thus happen that when a subject of one State takes passage or service on board the vessel of another, both States have concurrent jurisdiction over him. But the jurisdiction of the State of the vessel is the superior or primary one, while that of the other is inferior or secondary to it. This is well brought out in a case mentioned by Mr. Hall. (Int. Law, p. 252, n (1).) An English sailor on board an American vessel stabbed the mate. On the arrival of the vessel at Calcutta, he was handed over to the police for safe-keeping, but they proceeded to put him on trial before the Calcutta High Court, and obtained a conviction. On the United States Government complaining to the British Government of this assumption of jurisdiction, the latter expressed "its regret that the action of the authorities at Calcutta should have been governed by a view of the law which in the opinion of Her Majesty's Government cannot be supported."

The right of a State to exercise jurisdiction over all vessels in its ports, rivers and territorial waters, is clear on the principle of territorial sovereignty, but this jurisdiction is often not exercised in practice, just as in France it is not exercised even in theory, in matters relating to the internal discipline of the vessel or offences by one of the crew against another when the peace of the port is not affected. In so far as the territorial State refrains from exercising jurisdiction, the jurisdiction of the State of the vessel and with it that of the State whose subject the offender is, revives.

In places not within the jurisdiction of any State, it is clear that neither of the territorial theories can have any application as

such. But the principle of the subjective theory, namely, that protection and allegiance are correlative, rather than that of the objective, has, we have seen, to be called into requisition to explain the existing practice. If the latter were the governing theory, we should expect to find the following variations from the actual practice, as legitimate consequences :—

(1) The jurisdiction over subjects as such on the high seas should be abandoned and only offences committed against them should be made cognizable.

(2) A State would have to take upon itself to punish injuries done to its subjects on board foreign vessels by foreigners.

(3) The distinction between territorial and non-territorial waters, for jurisdictional purposes, should be given up. The three-mile limit is fixed for the reason that persons from within that limit may by means of cannon, etc., easily molest persons and property on shore, and that it is desirable for a State to protect itself against such acts by having jurisdiction over them. But if the objective theory were sound, a State can punish all offences against itself or its subjects wherever they are committed or wherever the offenders may be, and the three-mile limit would thus be unnecessary and unmeaning.

Some writers attempt to explain the practice as to jurisdiction on the high seas by means of the fiction that a ship is part of the territory of the State whose flag it flies. But this fiction is insufficient not only to explain the existing practice of a State exercising jurisdiction over its subjects in foreign vessels, but is also defective in other respects and has been rejected by eminent modern jurists. If it were sound, it would not afford countenance to either the subjective or objective theory more than to the other.

In the case of piracy, there is no State whose authority the pirates obey or profess to obey, or which can be held accountable for their acts. " A pirate either belongs to no State or organised political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject." (Hall, Int. Law, p. 253.) It is because the pirate belongs to no State that all States exercise jurisdiction over him; in other words, the subjective theory being admittedly

incapable of application, another theory is admitted to govern the case. And it must be noticed that the theory so admitted in the absence of the subjective, is not the objective (for States do not punish only such piratical acts as are directed against their own subjects,) but the "cosmopolitan" theory.

The principle to be extracted from the cases of *R.* v. *Satler,* (D. & B., 525,) *R.* v. *Serva* (2 C. and K., 53), and *Attorney-General for Hong Kong* v. *Kwok-a-singh* (L. R., 5 P. C., 180) as to foreigners illegally or against their will and by mere force detained on board British ships, supports the subjective theory. Referring to them, Sir James Stephen remarks: "None of them, however, is inconsistent with, and each of them more or less distinctly illustrates the proposition that protection and allegiance are co-extensive, and that obedience to the law is not exacted in cases in which it is allowedly administered, not for the common benefit of a community of which the alleged offender is for the time being a member, but for the benefit of a community of which he is an avowed and open enemy." (2, H. C. L., p. 8.)

Agreeably to the foregoing principles, an offence committed in barbarous lands not subject to the sway of a civilised or semi-civilised sovereign, would be cognizable by the State to which the offender belongs. The exceptional practice of some States, notably the United States, of exercising jurisdiction whenever their subjects are wronged, is opposed to principle and not followed by other States. When, indeed, the offender belongs to no State, as, for instance, where he is a savage, or a pirate, any State may try and punish him. As Judge *Vredenburgh* said in *State* v. *Carter,* 3 Dutch, 501 : "Where an act, *malum in se,* is done in solitudes, upon land where there has not yet been formally extended any supreme human power, it may be that any regular Government may feel as it were a divine commission to try and punish. It may, as in cases of crime committed in the solitudes of the ocean upon and by vessels belonging to no government, *pro hac vice,* arrogate to itself the prerogative of omnipotence and hang the pirate of the land as well as of the water."

In semi-barbarous lands which have a sovereign nominally at least exercising jurisdiction within them, it is universally recognized that that sovereign has jurisdiction over the subjects of foreign

civilised States within them. But by treaties and capitulations with European States, the jurisdiction over such subjects is conceded to the States to which they respectively belong, who exercise it through Consuls. Great Britain has, for instance, made such treaties with the Sultan of Zanzibar and the King of Uganda. The principle of the co-extensiveness of protection and allegiance was, in *Queen-Empress* v. *Montopollo*, (I. L. R., 19 B., 741,) applied so as to give the British Consular Court at Zanzibar jurisdiction over a Greek subject resident there, who fell within the class known as "British-protected persons." On the other hand, it was held in *Imperatrix* v. *Juma*, I. L. R., 20 B., 54, that the Uganda British Consular Court had no jurisdiction over a German subject for acts done by him outside Uganda. Among European States, Turkey, Roumania and Servia are the only ones which have made capitulations with other States conceding to the latter all civil and criminal jurisdiction over their subjects (Hall, Int. Law, p. 55.) There is thus nothing in this practice which is opposed to the subjective territorial theory.

An interesting question, which I have not yet dealt with, is, where offences by omissions are to be deemed to be committed. Sir James Stephen dismisses it as a speculative puzzle not worth discussion (2 H. C. L., 10). But I believe the previous discussion will supply us with a clue to the proper solution of this question. According to the principle therein sought to be maintained, the place where the offender is at the time of the omission is the place which will have jurisdiction. Thus, where a husband living in England intentionally lets his wife in France die for want of proper attention, he is triable for the homicide in England and not in France. In *Siddha* v. *Biligiri*, (I. L. R., 7 M., 354,) it was held, on the same principle, that where *B* having contracted in foreign territory to labour for *S* in British territory, broke his contract and was arrested in foreign territory and brought into and prosecuted in British territory, the Court had no jurisdiction. In *Gregory* v. *Vadakasikangani* (I. L. R., 10 M., 21), on the other hand, it was held that where *V* having received an advance of money from *G* contracted to labour for him in foreign territory, broke the contract and was prosecuted, it was held that the British Court had no jurisdiction, presumably as the contract had to be performed outside of British India. In *Queen-Empress* v. *Paranga*,

(I. L. R., 16 M., 468,) it was held that a British Indian Magistrate had not power to summon a witness to appear before him at a place outside British India, and that even if he had, the offence would have been committed in foreign territory over which a British Indian Court would have no jurisdiction. The latter two cases are thus opposed to the principle enunciated above, and cannot therefore be accepted in preference to the first. Inconveniences might sometimes arise by a rigid adherence to this principle in the case of omissions. A person, for instance, is subpœnaed in British India to appear as a witness before a Court on a certain day. Some time before that day, he goes out of British India and returns some time after. When he is out of British India, he lies under no obligation to attend in pursuance of the subpœna, and, on the above principle, will be punishable for the omission to attend, neither in British India nor outside it. The subpœna may thus be easily evaded. Other instances also may be imagined. Such cases, if they do not fall within the principle already referred to of asserting jurisdiction over offenders going abroad to evade a home law, may be provided for by conferring upon the aggrieved State jurisdiction to try them by means of treaties.

Next, as to the second part of our subject:—the grounds of jurisdiction as between different Courts within a State; and this need not detain us long. Primarily these Courts exercise jurisdiction on the same principles as States. But in their case, legislation is often and very usefully employed to give concurrent jurisdiction to other Courts. The dangers which have been pointed out of giving more States than one jurisdiction over an offence do not exist in the case of concurrent jurisdiction by more Courts than one of the same State. The common sovereign may be trusted to regulate their exercise of jurisdiction so as to prevent any indecent haste to seize and exercise jurisdiction, and to secure that a judgment of conviction or acquittal in one Court shall be a bar to proceedings in any other Court.

In India, for instance, Ss. 177, 179—185, and S. 188 of the Criminal Procedure Code lay down the place of trial of an offence. With regard to these sections, the caution already given, namely, that they merely serve to regulate existing, and not create any new, jurisdiction, should be borne in mind. S. 177 says that every offence shall ordinarily be tried by the Court within whose jurisdiction the offence was committed. By S. 179, an offence made up of anything which has been done and any consequence which

has ensued, may be tried either where such thing has been done or such consequence has ensued. Murder, for example, may be tried either where the wound is given or the death takes place. The instigation of a person to commit an offence by means of a posted letter may be tried either where the letter is posted or is received (*Queen-Empress* v. *Sheo Dial Mal*, I. L. R., 16 A., 389). Where a girl was sold at Mirzapore to a prostitute who took her to Benares, the possession of the girl at Benares was not a consequence constituting the offence of "buying a minor with intent that she shall be employed for purposes of prostitution" so as to give jurisdiction to the Benares Court (*Mussamat Jowalur*, 6 Agra, 46.) In the revised Code of this year (Act V of 1898), a new illustration has been added to this section which apparently seeks to overrule the cases already cited, which lay down the rule of interpreting these sections as merely regulating existing, and not as creating any new, jurisdiction. I have elsewhere (The Calcutta Weekly Notes, 1898, p. cxx.) endeavoured to show that this attempt is not only to be deprecated but is actually *ultra vires* of the Indian Legislature. To this section, I would suggest the adding of a clause to the effect that an offence of omission may be tried either where the offender is at the time of his guilty omission or where the act for the omission of which he is liable, ought to have been performed. By S. 180, accessories before or after the fact may be tried either where their accessory acts of abetment, etc., took place or where the principal offence was committed. In the new Code, a provision has been added to S. 181, making the offences of kidnapping or abduction triable either where the person kidnapped or abducted was kidnapped or abducted or was conveyed, concealed or detained. By S. 183, offences committed during a journey or voyage may be tried by any Court through whose jurisdiction either the offender, or the person against whom, or the thing in respect of which, the offence was committed, passed during the journey or voyage. 'Journey' here means a continuous journey from one terminus to another, so that where the journey was interrupted at Allahabad and an offence committed there it was held that the Magistrate at Howrah had no jurisdiction. *In re Hiramurr Ayah*, 21 W. R., 64. And the offence should have taken place while the journey was going on. Therefore, where the journey had so far as regarded the offender ended at an intermediate place, neither the fact that the original journey extended as far as Madras, nor that the offender subsequently came up to that place, could give the Madras High Court jurisdiction (*R.* v. *Malony*, 1 M. H. C., 93). S. 188 provides

that a Native Indian subject for any offence outside British India, and a European British subject and a servant of the Queen (whether a British subject or not) for any offence in the dominions of any Native Prince or Chief in India may be tried as if it had been committed at any place in British India where he may be found. The provision about servants of the Queen has been introduced for the first time by Act V of 1898, to remedy the defect which was brought to light by the decision of the Bombay High Court in *Empress* v. *Natwarai* (I. L. R., 16 B., p. 178), and to which attention was drawn in the first part of this article. There are also certain special provisions in special Acts like the Railways Act, which are in *pari materia*, and will be found collected in the note to S. 177 in Sir Henry Prinsep's Code of Criminal Procedure.

By the common law of England, the different counties stood to each other like different countries. This was carried so far that if a felony begun in one county was completed in another, the felon could not be tried in either. (Lacey's Case, cited in the first part of this article). But now, by 7 Geo. IV, c. 64, S. 12, felonies or misdemeanours committed on the boundary of two or more counties, or within 500 yards of any such boundary, or begun in one county and completed in another, may be dealt with in any of the said counties. The section applies to offences which are local in their nature, such as burglary, as well as to larcenies and other transitory felonies. (*R.* v. *Ruck*, 2 Rus. Crimes, 5th Edn., p. 46.) But it does not extend to trials in limited jurisdictions but only to county trials. (*R.* v. *Welsh*, 1 Moody C. C., 175.) Thus, where a wound was given within the Admiralty jurisdiction and the death took place in a county or *vice versâ*, the section would not apply. This case is now provided for by 24 and 25 Vict., c. 100, S. 10, to which reference has already been made. With regard to accessories also, the counties, in the eye of the common law, stood to each other as different countries. In the quaint language of the preamble to 2 and 3, Edw. VI., c. 24, "it is a common practice amongst errant thieves and robbers in the realm, that after they have robbed or slain in one county, they will convey their spoil or part thereof so robbed and stolen unto some of their adherents into some other county . . . . . who knowingly receiveth the same, in which case, although the principal felon be after attainted in one county, the accessory escapeth by reason he was accessory in another county, and that the jurors of the said other county by any law yet made can take no knowledge of the principal attainder

in first county." (Steph. H. C. L., Vol. I, p. 277.) But now, by 24 and 25 Vict., c. 94, S. 7, where any felony shall have been wholly committed in England or Ireland, accessories, before or after the fact, to such offence, may be tried by any Court having jurisdiction to try the principal felony or by a Court having jurisdiction where the accessory acts are committed; and in all other cases, such accessories may be tried either by a Court having jurisdiction to try the principal felony or by a Court having jurisdiction where they shall be apprehended or be in custody. By 24 and 25 Vict., c. 96, S. 114, the offence of larceny may be tried either where the thing was stolen or was possessed by the thief; and the offence of receiving stolen goods either where the offender shall receive or have such goods, in the same manner as if they had been originally stolen or taken in that place. Again, by 2 and 3 Vict., c. 82, S. 1, offenders in a detached part of a county, surrounded in whole or in part by another county, may be committed for trial, tried, convicted and sentenced in the latter county. By 7 Geo. IV., c. 64, S. 13, offences committed on persons or property in coaches employed in journeys or in vessels employed in inland navigation may be tried in any county through any part whereof, such coach or vessel shall have passed in the course of the journey or voyage. But the offence must be committed 'in or upon' the coach or vessel, so as to bring it within the section; hence, where a guard of a coach, on changing horses near Penrith, carried a parcel to a privy, and, while there, took two sovereigns from it, it was held the section did not apply (*R.* v. *Thorpe*, 2 Lew. C. C. 233.) By 38 Geo. III., c. 52, and 14 and 15 Vict., c. 55, S. 19, where an offence is committed within the county of any city or town corporate, the prosecutor may prefer his bill of indictment to the jury of the county next adjoining, and Justices of the Peace are required to commit for trial to the Court of Oyer and Terminer and gaol delivery for the same county. By the Merchant Shipping Act of 1894, S. 686, offences within the Admiralty jurisdiction may be tried by any Court within Her Majesty's dominions within whose jurisdiction the offender may be found.

Similar provisions may be found in the legislation of other civilised countries.

M. A. TIRUNARAYANACHARI.

TRANSLATED FROM THE VIVADARATNAKARA.

CHAPTER XXIV.

On the Adopted Son.

On this subject, Vishnu says: "The adopted son is the eighth in rank. He belongs to him to whom he is given by his mother or father."(1) *Commentary.*—After 'yasya' the word 'syāt' (belongs) is understood.

Manu says: "He whom his mother or his father affectionately gives with water in times of distress, being equal in caste, is considered the adopted son. The adopted son of a man possessed of all good qualities takes all his wealth, though come from another *gotra* (family). An adopted son shall not take the family name or the wealth of his natural father. The *pinda* follows the family name and estate and the funeral rites of one who gives his son in adoption cease in regard to that son."(1) *Commentary*—'In time of distress' means 'when the adopter has no son.' 'Sadrisam' means 'equal in caste.' Medhātithi, however, says that the equality contemplated is not one in respect of caste but one in respect of qualities worthy of the family. 'Affectionately' means 'without coercion, etc.' 'Qualities,' *i.e.*, caste, learning, behaviour, etc. Seeing that the adopted son is heir by the very fact of his being a son, the qualification about his possessing good qualities is to entitle an adopted son of good qualities to share in the inheritance even in the event of the subsequent birth of an *aurasa* son and also to indicate that the adopted son devoid of good qualities will, under similar circumstances, be entitled only to maintenance. 'Gotra' means 'the celebrated family name derived from sages, such as Kasyapa, etc'. As the offering of *pinda* always follows the family name and wealth, it also ceases. The word 'Svādah' denotes 'sraddha and other rites.'

Vasishtha says: "The son, formed of seminal fluids and of blood, proceeds from the mother and the father (as an effect from its cause). The mother and the father have power to give, to sell and to abandon him; but let him not give or receive an only son; for he should remain for the continuation of his ancestors' line. Let not a woman either give or receive (a son) without her

(1) Manu, Chap. IX, 168, 141 and 142.

husband's permission. One desirous of adopting a son shall invite his relatives, inform the king, make burnt offerings in the middle of his house, reciting the *vyahritis* and adopt one not a remote kinsman, than whom no nearer exists. If doubt arise, he shall set the remote kinsman apart like a Sudra. It should be well-known that through one he saves many."(1) *Commentary*—'Sale' and 'abandonment' are not allowed like gift. Sale is permitted only in distress; and abandonment in case of inability to maintain. Prakâsakâra says that the desertion of issue is an offence, as the offering of *pinda* and libations of water will cease. The father and the mother have each individually the power to give, with this difference: that if the father be alive the mother could give only with his permission and in his absence, even without his permission. 'Invite his kinsmen,' *i.e.*, in order that the adopted son may receive his share, assemble his own *sapindas*. 'Adurabāndhavam' means 'whose relatives, such as the maternal uncle, etc., are near the spot.' This is enjoined in order that his name, caste, etc., may be learned. In the absence of his relatives, learn his name, *gotra*, etc., by some other strong evidence and adopt. The word '*eva*' has the force of 'even.' If after taking in adoption one whose relatives are not near, a doubt arise as to his Brahminhood, etc., then the adopter should set him apart with maintenance like a Sudra son. 'Through one he saves many' means 'by means of one son, he saves many ancestors.' The meaning, therefore, is that he should adopt one whose caste, etc., is ascertained beyond a doubt.

Here ends the chapter on 'the adopted son'.

CHAPTER XXV.

On the son bought.

On this subject, Vishnu says: "The son bought is the ninth in rank."(2)

Baudhāyana says: "The son who is purchased from his father and his mother or from either of them and received in the place of a son is called the son bought."(3)

(1) Vasishtha, Chap. XV, 1—8. (2) Vishnu, Chap. XV, 20.
(3) Baudhāyana, II, 2, 3, 26.

Manu says: "The son, equal or unequal, whom a man buys from his father and mother for the sake of having a son, is the son bought."(1) *Commentary*—'Equal,' *i.e.*, of the same caste. In default thereof, of a different caste. So says Pārijāta. Prakāsakāra, however, says that although an unequal son is spoken of, one of a superior caste should not be taken as a son by one of an inferior caste, nor one of an inferior caste by one of a superior caste. He says that according to Medhātithi, the equality and the inequality is in respect of the possession of good qualities among those of the same caste.

Here ends the chapter on 'the son bought'.

CHAPTER XXVI.

On the son self-given.

On this subject, Vishnu says: "The son self-given is the tenth."(2) *Commentary*—He belongs to him to whom he gives himself.

Manu says: "The son who, having lost his parents or being abandoned by them without cause, gives himself is called the son self-given."(3) *Commentary*—'Without cause' means 'for no offence.' 'Gives himself,' *i.e.*, with the statement 'I am your son.'

Here ends the chapter on 'the son self-given'.

CHAPTER XXVII.

On the son rejected.

Vishnu says: "The son cast away is the eleventh. He is so called because he was forsaken by his father or mother (or both)."(4) *Commentary*—He belongs to him who receives him.

Manu says: "One, whom a man receives as his son after he has been deserted by both his parents or by either of them, is called the son cast off."(5) *Commentary*—'Utsrishtam' means 'abandoned.' The abandonment owing to extreme distress, inability to maintain

(1) Manu, Chap. IX, 174. (2) Vishnu, Chap. XV, 22.
(3) Manu, Chap. IX, 177. (4) Vishnu, Chap. XV, 24 and 25.
(5) Manu, Chap. IX, 171.

or from any other fault. Receives as a son and not for the purpose of feeding.

Vasishtha says: "The fifth is the son who, being cast off by his mother or father, is received as a son."(1) *Commentary*—'Fifth' here means 'fifth of the six sons of the second sort'.

Here ends the chapter on 'the son rejected'.

CHAPTER XXVIII.

On the son made.

On this subject, Manu says: "He is considered as the son made whom a man makes his son, if equal, skilled in discerning right and wrong, and endowed with filial virtues."(2) *Commentary*—Medhātithi says that even here the word 'equal' means 'equal in quality.' 'Right,' *i.e.*, the virtue of performing the funeral rites of the deceased parents and 'wrong,' *i.e.*, their non-performance. 'Filial virtues' means 'inclination to be of service, etc.'

Baudhāyana says: "He is called the son made whom a man makes his son with his consent, being equal in caste."(3) *Commentary*—'*Sakāmam*' means 'having the desire,' *i.e.*, thinking that if he would become the other's son, the other would receive him for a son. 'Equal' means 'equal in caste.'

Yājnavalkya says: "The son made so by himself is called the son made."(4)

The same author says: "This rule laid down by me applies to sons equal in caste."(5) *Commentary*—The expression 'if there be a son of equal caste' is understood. Prakāsakāra says that in respect of the son of the maiden, the son of concealed birth, the son of the pregnant bride, and the son of the twice-married woman, their equality by caste should be calculated with reference to their begetters and not by virtue of themselves, because they do not answer to the definition of equality of caste.

Here ends the chapter on 'the son made'.

(1) Vasishtha, Chap. XVII, 36 and 37.
(2) Manu, Chap. IX, 169.
(3) Baudhāyana, II, 2, 3, 21.
(4) Yājnavalkya, Chap. II, 131.
(5) *Ibid* II, 133.

CHAPTER XXIX.

The son by a Sudrá Woman.

On this point Vishnu says: "The son born of any woman whomsoever is the twelfth in rank."(1) *Commentary*—'Any woman whomsoever' means 'a Sudra woman, married or unmarried.'

Vasishtha says: "They declare that the sixth is the son by a Sudra woman."(2) *Commentary*—'Sixth,' *i.e.*, among the six sons of the second sort, but only the twelfth among all the sons, *aurasa*, etc. The expression 'they declare' indicates a variance of view. This difference of view concerns the son's right to inherit the wealth. Manu says so in respect of the son by a Sudra. The view differs, therefore, according as the son is possessed of good qualities or devoid of them.

Manu says: "The son whom a Brahmin begets through lust on a Sudra woman is a living corpse, and is, therefore, called a *Parásava*."(3) *Commentary*—'Living' because he fulfils to a small extent the desire of a man to become a father; 'corpse' because he is of poor service to his father.

Baudhāyana says: "A son begotten through lust upon a Sudra woman by a man of the regenerate classes is called a living corpse, a *Parāsava*."(4)

Again Manu says: "These eleven sons beginning with the *kshetraja* as already enumerated, the sages declare substitutes for the son to prevent the failure of rites. Those sons, who have been mentioned as sons along with the legitimate son, being begotten by others, belong to the owner of the seed from which they sprang, but not to any other."(5) *Commentary*—'Substitutes for a son' means 'substitutes for the *aurasa* and the són of the appointed daughter.' They have been declared entitled to do the duties of these in default of these, in conformity to the text of Brihaspati which follows. The reason is this: to prevent a failure of the rites, *i.e.*, for fear that the injunction that a man should beget offspring may be violated. This injunction is imperative. That the son

(1) Vishnu, Chap. XV, 27. (2) Vasishtha, Chap. XVII, 38.
(3) Manu, Chap. IX, 178. (4) Baudhāyana, II, 2, 3, 228.
(5) Manu, Chap. IX, 180 and 181.

should somehow be begotten follows from the following text. The latter half of the passage quoted by denying that these are the only primary sons indicates that these are substitutes; 'and not to any other' denotes that they are primary.

Brihaspati says: "Of the thirteen sons defined in order by Manu, the legitimate son of the body and the appointed daughter continue the line. As in default of ghee, oil is admitted by the virtuous as a substitute, so are the eleven other sons in default of the legitimate son of the body and of the appointed daughter."(1)

The Brahma Purana says: "The adopted son, the son self-given, the son made, the son bought, or the son rejected, must always be supported. They are considered to belong to a different *gotra*, unconnected by funeral cakes and continuing a different line. On birth and on death (of a kinsman) they share pollution for three days."(2) *Commentary*—By this text their liability to pollution for three days is incidentally mentioned.

Again the Brahma Purana says: "The *Parásava* sons of a Sudra are in some cases considered to be the sons of Brahmins who give food and raiment and of the owners of the soil and the seed; and so also of men of the warrior class afflicted with curse and always doomed to perish; and sometimes of men still bent on money and war."(3) *Commentary*—By this text the doubt of the non-existence of these sons is removed.

Accordingly it is said: "Where there is the legitimate son of the body or the son in the appointed daughter, these eleven sons, the *kshetraja* son and the rest, should be regarded as belonging to a different *gotra* and continuing a different line. They shall always perform the *sraddha*, etc., of their fathers, like servants."(4) *Commentary*—The word 'Putrikásuta' means 'the son in the form of the appointed daughter.' 'Kshetraja, etc.' means 'all sons, the *aurasa* and the appointed daughter excepted; where there is the *aurasa* son or the appointed daughter, the *kshetraja* and the rest only continue the line. 'Like servants' means 'from the mere obligation to do the bidding.'

(1) Brihaspati, Chap. XXV, 33, 34. (2) Cole. Dig., Vol. II, 404, CCLXXVII.
(3) Cole. Dig., Vol. II, 413, CCXCIV. (4) Cole. Dig., Vol. II, 414, CCXCV.

Again it is said: "By the rich Vaisyas, the son of concealed birth, the son of the maiden, the son of the pregnant bride, the *kshetraja* son, the son of the twice-married woman, these five sons are, for fear of the king's chastisement, shunned. The rest are sons of twice-born men."(1) *Commentary*—This text also shows that the Vaisya may have secondary sons. Thus these texts say that the Brahmin, the Kshatriya and the Vaisya may have secondary sons.

Next the following text shows how difficult it is for a Sudra dependent upon his lord to beget sons. "To the Sudras whose occupation is servitude, who live on food supplied to them by others and whose bodies exist for others' use, sons could never be born."(2)

In reply to the question whether a son is never born of one of the servile class it is answered: "If from such a servant, whether man or woman, a son is born, that son is himself a servant."(3) *Commentary*.—The meaning is that the son so born is himself dependent on his lord and is never independent in the discharge of his duties as a son.

Here ends the chapter on 'sons by a Sudra woman.'

CHAPTER XXX.

On the Inquiry into Sonship.

On this subject, Vasishtha says: "The wise are at variance on the question; some say that the son belongs to the owner of the soil, and some, to the begetter."(4)

Āpastamba says: "Carefully watch over your wives, lest the seeds of strangers be sown on your soil. The son belongs to the begetter. So far as the next world is concerned, the husband makes such children worthless."(5) *Commentary*—'Apramattah' means 'without inattention.' 'Tantum' means 'male issue.' 'Vapsyuh' means 'be sown.' Lest others' seeds be sown upon the soil. 'Begetter,' *i.e*, the owner of the seed. After 'belongs to' the word 'benefits' is understood. '*Sāmparāyā*' means 'in respect of benefits relating to the other world.' 'Mogham' means 'fruitless.'

Again it is said: "Ancient sages in the hymns sung by the God of the Wind say that a man should not sow his seed on the soil of

(1) Cole. Dig., Vol. II, 414, CCXCVI. (2) Cole. Dig., Vol. II, 414, CCXCVII.
(3) Cole. Dig., Vol. II, 414, CCXCVII. (4) Vasishtha, Chap. XVII, 6.
(5) Āpastamba, II, 6, 13, 7.

another. As the arrow aimed by one in the air at a deer already hit by another is wasted, so is the seed of one when sown upon another's soil."(1) *Commentary*—The arrow aimed by one at an object through the hole made by another's arrow is wasted. The game has been declared to belong to that other.

Again it is said: "As a perfect man consists of his wife and his issue, so it has been declared that the wife is one with the husband."(2) *Commentary*—As a perfect man includes himself, his wife and his issue, so the wife includes herself and her husband. Even if she were sold, she would not become another's wife. When sold or abandoned, it is said: "The wife is not released from her tie to her husband even by sale or by abandonment."(3) *Commentary*—'Nishkraya' means 'sale.' 'Visarga' means 'abandonment.'

Again it is said: "As with cows, camels, female slaves, goats, ewes and milch-buffaloes, it is not the begetter that owns the offspring, even so it is with the wives of others. Those, who having no field have seed and sow it in another's soil, shall never receive any benefit from the crop which they produce. If (one man's) bull beget a hundred calves on another's cows, they would belong to the owner of the cows and the bull would have spilt its blood in vain. Similarly, the seed of men, who having no ownership in the soil sow it upon the soil of others, benefits the owner of the soil; the owner of the seed reaps no benefit."(4) *Commentary*—The same author on a thorough consideration of the Srutis elaborates the point in the following text:—

"Where no agreement respecting the crop is made between the owners of the soil and the seed, the benefit evidently belongs to the owner of the soil; the receptacle is more important than the seed."(5) *Commentary*—Where the owners of the soil and of the seed do not both exist, then the crop belongs to the owner of the soil and not to the owner of the seed. The author renders this point clear by the following text:—

"If the seed carried by water or wind germinates in the soil of a man, the crop belongs to the owner of the soil, and the owner

(1) Manu, Chap. IX, 42—43.
(2) Manu, Chap. IX, 45.
(3) Manu, Chap. IX, 46.
(4) Manu, Chap. IX, 46—51.
(5) Manu, Chap. IX, 52.

of the seed receives no benefit."(1) *Commentary*—Similarly the soil is the more important in the case before us. 'Oghah' means 'a flowing stream.' 'Āhritam' means 'carried.'

The author thus concludes:—"This should be understood as the law regarding the offspring of cows, mares, female slaves, camels, she-goats and ewes, birds and milch-buffaloes."(2) *Commentary*—'This law,' that is, that the owner of the seed does not receive the benefit.

Sankha and Likhita say: "When seed is sown upon one's soil without his knowledge, the crop certainly belongs to him."(3)

Gautama says: "The son begotten upon another's wife is not entitled to a share."(4)

When speaking of *Niyoga*, Gautama says: "(She shall bear) not more than two (sons). The issue belongs to the begetter in default of a special agreement. If begotten on the wife at the request of the husband living, it belongs to the husband; if by a stranger, to the begetter. But being protected by the husband, it belongs to him; or to both the begetter and the husband of the wife."(5) *Commentary*—The husband authorising his wife to raise offspring for him shall not allow her to beget more than two sons, such as a third, and so forth. If she begets more, they belong to the begetter. In default of a special agreement, all the issue belong to the owner of the soil. The issue begotten on the wife of a man who is incompetent to procreate, though it be the third, belongs to the husband of the wife even without a special agreement. If the owner of the seed maintains the wife, then the first issue belongs to the owner of the seed, and if the husband protects her, to him. Where both are desirous of offspring, then the offspring belongs to both. This is the meaning.

Nārada says: "No crop can be produced without soil; nor can there be a crop without seed. The issue therefore belongs by right to both the father and the mother."(6)

Sankha and Likhita say: "The Veda declares that the issue always belongs to the husband of the mother. Some sages say that

(1) Manu, Chap. IX, 54.
(2) Manu, Chap. IX, 55.
(3) Not found.
(4) Gautama, Chap. XXVIII, 23.
(5) Gautama, Chap. XXVIII, 8—14.
(6) Narada, Chap. XII, 59.

it belongs to both and celebrates both with the same *pinda*." (1) *Commentary*—'Dvyāmushyāyana' means 'belonging to two fathers.' 'Anumantrayate' means celebrates both fathers with the same *pinda*.'

They quote the following: "Of Vasishtha and Kasyapa who were under water, one gets out of the water and begets issue, being unknown to the world." *Commentary*—'Udāvasāt' means 'from his residence under the water.' *One of them begets an issue* upon the wife of the other.

If it be asked what follows from this, it is replied, "Thus both of them have issue in two ways."

"The following is another peculiarity; for following the custom of the family of one of them, taking his wealth and offering him the *pinda*, they also offer the *pinda* to the begetter, although begotten upon another's soil." *Commentary*—'Parigrahah' means 'observance'; 'Riktha' means 'taking of wealth.' Having offered the *pinda* and water to one of them, *i.e.*, the owner of the soil, they offer *pinda* and water also to the begetter, though begotten upon another's soil.

Here ends the chapter on 'the inquiry into sonship.'

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Visvalinga Pillai v. Palaniappa Chetti, I. L. R., 21 M., 1. We doubt the correctness of the decision of the learned Judges in this case. The mortgagee is to be in possession for three years and to pay himself both principal and interest out of the usufruct. We do not see why it does not fall within the definition of a usufructuary mortgage. It does not seem to us necessary to constitute a usufructuary mortgage that any portion of the mortgage money should be payable on the date of redemption. Again the learned Judges held that, on the lapse of the three years, the mortgagor can recover in ejectment although the mortgagee has not been placed in possession of a portion of the mortgaged property. It appears to us that when the mortgagor failed to put the mortgagee in possession of the whole, the mortgagee became entitled to recover the portion of the mortgage money which remained unpaid out of the usufruct under S. 68. It seems to us there is no justification for restricting

(1) Not found.

the scope of S. 68 to cases where any portion of the mortgage money is repayable under the contract. The language of S. 68 is general. The mortgagee is entitled to either of two remedies, namely, the profits of the property not placed in possession or the balance of the mortgage money which remained unpaid out of the usufruct. Before redemption, the mortgagor is bound to pay the sum so received.

Theyyavelan v. Kochan, I. L. R., 21 M., 7. It may be that the decision in this case is not open to exception. But the principle laid down by *Davies* and *Boddam*, JJ., that although a suit will not lie under S. 317, C. P. C., against a certified purchaser, it will lie against a person claiming by purchase from the certified purchaser appears to be questionable. We can see nothing in principle in support of the view of the learned Judges, though the section has been the subject of much judicial comment and not a few conflicting decisions. It appears questionable whether the further limitation imposed in this case upon the scope of the section is right. The section no doubt speaks of the suit against the certified purchaser alone and does not speak of a suit against persons claiming under him; while as regards the plaintiff suing it speaks of the real purchaser and of the persons claiming under him. We do not think that we can attach any weight to this difference, as the assignee cannot fail to have the rights of the assignor unless the assignment was a fraud upon the rights of others.

Krishnan Nambiar v. Kannan, I. L. R., 21 M., 8. We must take exception to the soundness of the decision in this case. In every sale after the Transfer of Property Act of immoveable property, a covenant for title is implied. We cannot agree that such implied covenant is a contract in writing registered. When the Limitation Act speaks of a contract in writing registered, it refers to that term, the breach of which is sued for as in writing registered. The question is not whether the implied covenant is part of a contract, but whether that portion of the contract is in writing.

Nayinappa Chetti v. Chidambaram Chetti, I. L. R., 21 M., 18. The view of the Madras High Court that notwithstanding a decree for redemption and default in executing the decree, it is open to the mortgagor to bring a fresh suit for redemption as upon a subsisting mortgage has been more than once criticised by us as unsound. Unless the Privy Council overturn the course of decisions in this Presidency, we must take this principle as practically settled. But it does not necessitate the conclusion that none of the questions decided in the previous suit for redemption has the force of *res judicata* in the subsequent suit.

It would seem to us absurd to suppose that the decision in the previous case as regards the terms of the mortgage relation or the amount due under the mortgage should be the subject of fresh litigation between the same parties.

Sami Ayyangar v. Ponnammal, I. L. R., 21 M., 28. *Subrahmania Aiyar* and *Benson*, JJ., declined to depart from the rule laid down by the Privy Council that there must be an antecedent debt to justify a sale of ancestral property by a Hindu father even if there was no family necessity. The Calcutta High Court no doubt suggested that the debt was always antecedent to the suit and the sale asked for in it and, therefore, a compulsory court-sale of the son's interest also was justifiable in every case of a fathers' debt. However desirable it may be to get rid of refined distinctions on the subject, there does not appear to be sufficient warrant for whittling away the language used by the Privy Council.

Bojjamma v. Venkataramayya, I. L. R., 21 M., 30. The point involved in this case is one of considerable importance but we can hardly congratulate the Judges upon the judgment they have delivered. The question is not free from difficulty as appears clearly from the opposite view taken by two other learned Judges. Whether in a suit upon a promissory note the defendant can plead that the payee was only a benamidar is a question that ought to have been decided upon the language of the Negotiable Instruments Act and not upon the mere assertion that a promissory note is a different thing from land. Why the same principle does not apply in a suit upon a note requires explanation. Reference is made to suits on contracts, but we do not know whether it will be said that in a suit upon a bond the defendant cannot plead that the plaintiff was only a benamidar. Nor does it appear to follow that in a suit by a stranger upon a bond claiming to be really the person entitled though not the obligee named, the defendant can defeat the claim of the plaintiff, not being the person named in the bond. The same question, we ask, with regard to similar suits on a promissory note. The answer appears to us to depend on a consideration of the language of the Negotiable Instruments Act; and if this be the correct view the argument cannot apply to suits upon a bond.

Achuta Menon v. Achutan Nayar, I. L. R., 20 M, 35. We are unable to agree with the decision of the learned Judges in this case, that where a plaintiff sued as lessee from the Zamorin to eject the defendant and withdrew his suit without leave, he could not afterwards maintain another suit upon a fresh lease from the Zamorin. We are unable to think that the fresh suit for the same matter referred to in-

S. 373, C. P. C., refers to suits upon a fresh cause of action which did not arise at the time of the former suit. We are also of opinion that there is misapprehension as to the meaning of the phrase 'fresh cause of action.' None of the decisions referred to appears to us to support the decision of the learned Judges. Supposing the former suit to have been tried and dismissed on the ground that the first lease was untrue, there would be nothing to preclude a second suit upon the new lease. Stress is laid upon the words '*for the same matter*,' but, we think, the learned Judges are bound to concede that if the new suit is brought upon a new title, say, gift or bequest, a title, be it assumed, which was not available as a ground of attack at the time of the former suit, a new action will lie. Surely the case of withdrawal cannot be put upon a higher footing.

SUMMARY OF RECENT CASES.

Married Woman—Separate estate—Restraint on anticipation.

Lady Bateman *v.* Faber [1898, 1, Ch. 144, C. A.]

Under the English Law the married woman seems to have been given greater protection than even an infant, so much so, that it has been held that even fraud or estoppel could not deprive her of the protection which her separate property enjoys when it is restrained from anticipation. The plaintiff, a married woman, was entitled under a settlement to property called Kil-Marsh estate for her life, for her separate use, without power of anticipation. The settlement contained a provision that if at any time she should come to an income, in her own right, of £8,000 or more per annum, for her separate use, then the trust under settlement should cease, and the property be held in trust for her husband. In order to assist her husband in coming to some arrangements with a creditor of his, she executed an instrument in which she stated she had succeeded to the estate of £8,000 and that her life interest under the settlement had ceased. On the faith of this statement the creditor entered into an arrangement with the husband for his benefit. The wife, however, subsequently sued to receive the income of the property for her life, notwithstanding her admission. The Court of Appeal affirming the decision of *Kekewich*, J. (1897) 2 Ch. 223, held that she was not estopped from receiving the income. The Master of the Rolls (*M. R. Lindley*) said "it is new in point of detail, but in principle it is very old. A married woman cannot by hook or by crook, by any device, even by her own fraud (the cases go that length) deprive herself of the

protection which the restraint on anticipation throws around her. About the policy of the law we say nothing, but it has been sanctioned by the "Married Woman's Property Act."

Trade name—Fraud.

F. Pinet & Cie. *v.* **Maison Louis Pinet, Limited** [1898, I. Ch. 179, per *North*, J.]

A man can have under the law any name he pleases, only he ought not to so use the name as to pass himself off for another or his goods for those of another. He may also change his name how often so ever he likes and there is nothing to prevent him from doing so, but if he changes his name for a fraudulent purpose, he will be absolutely prohibited from using the name in the business in connection with which he intended the fraud.

L, a solicitor, took the name of Pinet and commenced business as maker of boots and shoes. He then sold his business to a limited Company called Maison Pinet, Limited, formed for the purpose of taking over and carrying on that business. The plaintiffs were a firm of boot and shoe manufacturers of Paris called S. Pinet and Company and had a large business in London. They had brought an action against the company Maison Pinet and Co., and got an order restraining the defendant from using the name Pinet in connection with the sale or manufacture of boots and shoes, without distinguishing their articles from those of the plaintiff. Subsequently, however, that company went into voluntary liquidation and transferred its assets to another company Maison L. Pinet, Limited, of which L. was a director. The plaintiffs brought the present suit to prevent the defendant company from using the word Pinet at all in connection with their trade. There was no evidence in the former action that the defendant Pinet had ever borne another name. In the present action, however, it was proved that the defendant had adopted the name Pinet for the very purpose of passing off his boots and shoes for those of the plaintiff's manufacture. Upon these facts *North*, J., issued an injunction perpetually restraining the defendant absolutely from using the name Pinet in any manner of connection whatsoever with his manufacture and sale of boots and shoes.

Conspiracy—Malicious wrong—No action for conspiracy unless it is to do a wrongful act.

Huttley v. Simmons and others, [1898, I, Q. B. D., 181; *Darling, J.*]

The House of Lords decided in *Allen* v. *Flood* [1898, A. C., p. 1] that the existence of a bad motive in a person in the case of an act which is not of itself illegal, will not convert that act into a civil wrong for which reparation may be due. In delivering their judgments several members of the House had expressed a doubt whether the law may not be different in the case of a combination of persons with a bad motive. The present case was exactly such a case, but *Darling*, J., has ruled that a conspiracy with a bad motive will not make any difference in the law, unless it be to do act in itself unlawful. The plaintiff, a cab driver, sued S and others for damages sustained by him in consequence of the defendants having induced Y, a cab proprietor, to refuse to engage the plaintiff to drive a cab for him, or to let a cab to the plaintiff to be so driven. The jury found that defendants had conspired together and done this act maliciously in order to injure plaintiff and procure some advantage to a third person. The presiding judge non-suited the plaintiff and held that a conspiracy to do certain acts (not being criminally punishable) gives a right of action only where the acts agreed to be done, and, in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff.

International law—Action by foreign sovereign—Cross-proceedings.

South African Republic v. La Compagnie Franco Belge, &c., [1898, I, Ch. 191, per *North, J.*]

The plaintiffs, a foreign sovereign state, entered into a contract with the defendants by virtue of which large sums of money were deposited in the names of two persons, one the nominee of the Government and the other of the defendants, for the purpose of being utilized in the construction of a Railway. Disputes soon arose as to the proper application of these funds, the two nominees not agreeing as to *modus operandi*. The nominee of the Government died and the funds then survived to the nominee of the defendants. The plaintiff then brought a suit in Courts of England against the defendants and the banks where the money had been deposited for the appointment of a new trustee of the fund and to restrain the defendants from dealing with the fund. The defendants set up a cross-claim for damages for breach of certain concessions made by the

plaintiff. *North, J.*, struck off the cross-claim. He held that a foreign sovereign, because he submits himself as plaintiff to the jurisdiction of our Courts with respect to one matter, cannot be made a defendant with respect to another and quite a distinct matter. There may be a proceeding against a foreign Government plaintiff by way of counter-proceeding, by cross-bill, a bill of discovery—it might be either a bill of discovery, if necessary, or a cross-bill—in the nature of a defence to the proceedings set up by the plaintiff; but not a proceeding setting up against the sovereign another claim in respect of another and entirely distinct matter.

JOTTINGS AND CUTTINGS.

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State Library Bulletin of New York, Legislation No 9.

General Digest, American and English, Quarterly Advance Sheets, with supplement for January 1898, published by *The Lawyer's Co-operative Publishing Company, Rochester, N. York*, single number $ 1. $ 4 a year (*in exchange.*)

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Succession of Cognates under the Mitakshara:—We draw the attention of our readers to the very able article on this subject from the pen of "Jurisprudence" which appeared in the February number of this Journal and which is continued in this issue. The question as to who are heritable *bandhus* has been very ably examined by the learned author, and we hope to refer to the question ourselves on some future occasion.

* * *

A convicted murderer's anxiety;—The announcement comes from St. Louis that a convicted murderer there, who is to be executed this week, has been negotiating with a local medical college, with reference to the sale of his body to the institution. In this State the Penal Code

expressly declares that a person has a right to direct the manner in which his body shall be disposed of after his death. Whether this applies to one convicted of murder, however, may be somewhat doubtful, in view of the provisions of law relating to the body of a criminal upon whom the death penalty has been inflicted. Such body, unless claimed by some relative or relatives of the person so executed, is required by the Code of Criminal Procedure to be interred in the graveyard or cemetery attached to the prison, with a sufficient quantity of quicklime to rapidly consume the remains.—*The Albany Law Journal.*

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The Evils of Dissenting Opinions:—There never should be a dissenting opinion in a case decided by a court of last resort. No judge, lawyer or layman should be permitted to weaken the force of the court's decision, which all must accept as an unappealable finality, The decision should be that of the court, and not of the judges as individuals. The judges should get together and render a decision settling the points in controversy. The decision rendered should not reflect the opinion of this judge or that judge, but should be the opinion of the court.

If I were a candidate for a position, what possible good could it do to tell me "You are elected, but three members of the Board of Directors voted against you," or if I applied to a bank for a loan, to tell me that I could have it, but two of the discount committee voted against the loan because they doubted my solvency? In effect the courts say to a suitor, "We decide for you, but two or three judges still think you are wrong."

Dissenting opinions may be as pleasant to the minority judge as it is for a boy to make faces at a bigger boy across the street, whom he can't whip. They give a judge an opportunity of exhibiting his individual views and opinions. But what good does that do? What cares the public for the judge's individual views, except in so far as, by reason of his position, they assume the force of law? The only concern of the public is with the decision of the court as a court, so that they may know what it is, and know how to govern themselves.

The curtain should not be raised to present the disagreeable picture of family discord and want of harmony.

It is a maxim of the law that it is to the interest of the public that there should be an end to litigation. It certainly is to the interest of the public that when a question is settled by the highest tribunal, it should remain settled for all time. The result of a dissenting opinion

is simply to open up for future discussion, bickering and litigation the question which should then be finally settled by that tribunal. Somebody must settle the question; it must be settled somewhere; that tribunal has been selected as the final arbiter, and when it once settles it, it should remain settled for ever.

If a dissenting opinion is well written it impresses not only the particular litigant, but all who read it, with the idea that injustice has been done by the courts; a feeling of dissatisfaction arises, a feeling of great wrong is cast broadcast. The court has been weakened in popular esteem, for in the opinion of the reader of the dissenting opinion it has lent itself to injustice and inflicted wrong.

A dissenting opinion is to some extent an appeal by the minority—from the decision of the majority—to the people. What can the people do? They can't alter it; they can't change it; right or wrong; they must respect and obey it. Why shake the faith of the people in the wisdom and infallibility of the judiciary? Upon the respect of the people for the courts depends the very life of the Republic.

If nothing else is accomplished, one good result at least would surely follow the abolition of dissenting opinions—the opinion of the court would be shorter and more concise, stating in plain English the points decided, and succinctly the reasons therefor—,for all the judges being responsible for it, would see that it was not filled with obscure illustrations and be clouded with alleged reasons of doubtful logical force. If we had shorter opinions, the judges would have time to write better ones.

Nothing of any benefit to the public can be gained by a dissenting opinion.—*The Albany Law Journal*.

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Some stories of Lord Russell:—One of the greatest jurists at present living is Charles Russell, the lord chief justice of the Queen's Bench. Lord Russell is not only an Irishman, but an eminent lawyer, a world-famous orator and a wit of no small dimensions. Many stories are told illustrative of his skill at that most difficult of arts—repartee.

Once, it is told, when he was pleading in a certain case, he was constantly annoyed by being interrupted by the counsel for the other side Sir Digby Seymour, At last, losing all patience, Russell broke out in his strong Irish brogue: "I wish you wouldn't interrupt so much, Sir Digby Saymour." "My name is Seymour, not Saymour," answered Sir Digby, sharply. "Well then," rejoined Russell, "you should see more and say less."

On another occasion, when he was visiting this country, he was walking beside the Potomac river one day with William M. Evarts, who was then Secretary of State. When they arrived at a certain part of the river Mr. Evarts paused. "This," said he, "is the place where George Washington threw a dollar across the Potomac." "Oh," responded Russell, "that must have been quite an easy task for a man who cast a sovereign over the Atlantic."

But the last of these stories will, perhaps, be best appreciated by my legal readers.

A young lawyer was one day making a plea before Lord Russell. It was late in the afternoon, the hour for adjournment was fast approaching, and the young barrister, anxious to finish before closing time, was hurrying along as best he could. Suddenly he spoke of 2 Q. B. D. Lord Russell interrupted him sharply. "You forget yourself, sir," he said sternly. "You forget yourself. That is no way to address this court." The tyro was profuse in apologies, and explained that he only meant to refer to 2 Queen's Bench Division of the Law Reports. But the chief justice refused to be appeased. "Why," he cried, "I might as well say to you, U. B. D."—*The Calfskin.*

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Legal Laughs.

"Gentlemen of the jury," said the lawyer impressively, "our defense is insanity. I shall show that my client once served on a jury and listened to expert testimony for four months."

Of course he was acquitted.—*The Albany Law Journal.*

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"And where was the man stabbed ?" asked the excited lawyer of a physician.

"The man was stabbed about an inch and a half to the left of the medial line, and about an inch above the umbilicus," was the reply.

"Oh, yes, I understand now ; but I thought it was near the town hall."—*The Albany Law Journal.*

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Legal Education in the Continent and America.

We take the liberty of extracting the following from an article that appeared in the Law Magazine and Review on "The Faculty of Law in a Teaching University" by Montague Crackanthorp, Q. C. D. C. L.

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"I begin with Germany, because in that country education is more completely organised than in any other part of the globe. In the German empire there are twenty Universities, all supported by the State, yet all to a great extent self-governing. Each comprises four Faculties—Philosophy, Theology, Medicine, and Law. These Faculties are the avenues to the various learned professions, as well as to all the State offices. No one can matriculate at a German University who has not gone through a course of secondary education either at a classical *gymnasium*, or at a *real gymnasium* or *real schule* (these two last corresponding to the "modern side" of our English public schools). Now in the German University—I take Prussia as typical of the rest—the law student attends lectures on the philosophy of law, on the foundation of legal principles, on the history and theory of legal conceptions, such as the family, contract, succession at death, and so forth. This is termed the "philosophical course," and is gone through by way of introduction to the course in professional law of which there are quite as many as with us. The subjects of the first set of lectures I shall hereafter indicate by the general phrase "theoretical law," to distinguish them from the subjects of the second. Roughly speaking, by "theoretical law" I mean that which forms a necessary part of a wide, liberal education and without some knowledge of which a man does not feel perfectly at home in the society of well-educated people. By "professional law" I mean such technical knowledge as no layman need blush for being without. Obviously the two run into each other. But the broad distinction between them is clear enough.

German law teaching has one special feature which is worth while recording here, since it has been bound peculiarly efficacious for furthering habits of reflection and stimulating original thought. I allude to the *Seminar*, of which the following description is taken from an eye-witness:—The *Seminar* meets every week in a special chamber more convenient and more elegant than the ordinary lecture-room. There are two long tables and one short cross table, in the centre of which is the Professor's seat. The students come in one by one, salute each other ceremoniously, according to German fashion, and take their customary seats, each having behind him a drawer or cupboard where he can place his books and manuscripts. The Professor enters, having in his hand a treatise composed by one of the pupils on some subject which the Professor has given out. This he has already carefully read and annotated, in order that he may discuss it with the class. He begins by pointing out its literary merits and defects. He then indicates the sequence of ideas and provokes a debate on moot points.

There is no desultory talk, no unnecessary interruption. What is new in the law is illustrated by what is old, both historically and philologically. So completely arrested is the attention of the pupils, that, although the *Seminar* lasts two hours, there is no sign of fatigue or impatience on their part.

In Prussia, the legal *Seminar* comprises three sections, viz., Roman, German and Canon Law. A student wishing to become a member presents himself beforehand to the Professor, who ascertains by personal inquiry whether he is sufficiently equipped to benefit by it. Once admitted, a new relation of an intimate kind is established between the master and the pupil, reminding one of that which subsisted in ancient Rome between the patron and the client. The pupil has the privilege of seeking the master's advice, in and out of University hours, as often as he reasonably requires it.

A word or two as to University examinations in Germany. Of these there are two kinds—academic and State. The former qualify for the doctor's degree, which is the only passport to professorial rank; the latter qualify for the learned professions. The academic examination in law is conducted by two legal practitioners, in conjunction with two members of the University teaching staff. To them is added a Magistrate or Judge, whose office is mainly nominal, but who has a casting vote in the event of an equal division of opinion as to the merits or demerits of a candidate. The form of this examination resembles that for the doctor's degree in our own ancient Universities. It consists of two parts, the first being the composition of a treatise on some branch of law chosen by the candidate himself, the second being an oral examination in all branches of the law and also in political economy. The oral examination often lasts four or five hours, and is a most effective engine for detecting and checkmating *cram*.

France, like Germany, only opens the door to the higher education through its secondary schools (*lycées, colléges communaux*). But there the parallel ends. Whereas in Germany the *gymnasium* is only a preparation for the University, which alone confers a diploma or degree (usually at the age of 25), a diploma of the nature of a degree may be obtained in France at a *lycée* or a *collége* by a lad of 18. Again, in France until very recently, there were no Universities at all. There were only Faculties, consisting of Professors appointed by the State with a titular dean (*doyen*) at their head. Moreover, these Faculties were not self-governing like the German Universities. They were merely subordinate parts of an elaborate machinery (*L'Université de France*) designed by the First Napoleon as a means of centralising State control.

The French Faculties of Law concerned themselves exclusively with the professional training of *avocats* and *avoués*, these being, as with us, separate limbs of the same body. Of theoretical law, as I have defined the term, there was next to none. Everything was sacrificed to practice.

So matters stood down to the Franco-German War. But *fas est et ab hoste doceri*. Since then a great change has taken place. Chairs of public law (national and international) have been founded. The philosophy and history of law, comparative law, and the theory of législation, have been made separate subjects of instruction. In short, the French have for the last quarter of a century been remodelling their educational system upon German lines. Finally, a decree of 1896 has put the coping stone on the educational edifice by incorporating each local group of Faculties into a distinct University. The ideal for which Guizot, Cousin, and Taine so long and so powerfully laboured has thus at last been realized.

In Belgium, the demand for legal educational reform has been of late years even brisker than in either of the countries just mentioned. It began in 1894 with a resolution passed by the Brussels Junior Bar (the *jeune barreau belge* is a wonderfully energetic body), demanding that legal teaching should be made more scientific, and that this should be accomplished by University teaching and University examinations. As a consequence of this resolution, a Special Commission was appointed in 1895. It recommended that, in addition to strictly professional subjects, the following should form part of the legal curriculum—psychology and moral philosophy, logic, philosophy of law, elements of the history of law, elements of the history of philosophy—these to be compulsory. It further recommended that there should be optional examinations in literature, natural science, elements of political economy, history, modern languages (especially English and German), and Latin philology. Truly a formidable list! What will be said to it by the Inns of Court student whose tests in general culture are confined to a knowledge of his own tongue, of a little Latin prose, and a little English history?

To complete the general survey it remains to glance at the state of legal education on the other side of the Atlantic.

There are in America no less than 13 Universities and institutions (without reckoning the Law Schools, properly so-called, as to which a word presently) where theoretical law is taught. Early in the present century the Corporation of Yale College, Connecticut, voted the

establishment of a Professorship of Law, the design of which was "to furnish lectures on the leading principles of the Law of Nature and Nations, on the general principles of Civil Government, particularly of Republican Representative Government, on the Constitution of the United States, on the various obligations and duties resulting from the social relations between National and State Governments." In 1826, the friends of Chancellor Kent established at Yale the Kent Professorship of Law which embraces National, International, Constitutional and Municipal Law, and such other subjects of jurisprudence as the Corporation of the College shall from time to time approve. This Professorship was at one time held by Mr. E. J. Phelps, whose recent official sojourn in London is associated with such pleasant memories for many of us.

As a practical illustration of the way in which historical jurisprudence is taught in an American University, it is worth while to quote from the evidence given by Mr. G. H. Emmott, Professor in that department at the John Hopkins' University, Baltimore, before the Gresham Commission:—

"It is usual for the men who work with me to make their main study in the field of history. They usually in that way select history as their principal subject; historical and comparative jurisprudence as their first subordinate subject; and very frequently political economy as their second subordinate subject. They then write a thesis on some special topic of history; for instance, a thesis that I have in mind at the moment relates to the early English manor. That is a thesis written by a man who took history as his principal subject and made a special study of the old English manor from such documents as he has access to on our side of the Atlantic. When he came to the end of his three years, he would be examined in the whole field of history, but naturally with special relation to such particular department as he had studied. He would be examined in the history of principles of Roman law, the general history of the English common law, and a knowledge of the leading statutes, and he would also be examined in the more general principles of political economy."

Here again, as in the German *Seminar*, is scope for original work. What, I repeat, does the Inns of Court student say to it?

Of American Law Schools, properly so-called, there are now 81, numbering upwards of 10,000 students. Of these schools, some 68 are connected with Universities. The earliest American Law School was established in Litchfield, Connecticut, in 1784. The next in point of date was the Harvard Law School at Cambridge, Massachusetts, which

was opened in 1817. Here it was that Mr. Justice Story began to lecture in 1829, and to him and to his successors in the same chair we are indebted for many valuable contributions to our legal literature.

The American Law Schools did not for some time attempt to teach theoretical law, but quite recently a movement has displayed itself in favour of their doing so, This is due to the efforts of a Committee of the American Bar Association which, in 1891, recommended that wherever a longer course of study was possible, provision should be made there for courses in general jurisprudence and public law, and that students should be required, in addition to the usual course in private law, to pursue at least a certain number of subjects in public law, international law, the history and theory of law, comparative jurisprudence, and the science of government.

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Law Lectures—Their value and the secret of their success.

Before leaving the subject of teaching by lectures—of which in my time I have had some experience both as lecturer and lecturee—I should like to say a few words upon what appear to me to be their real value and what the secret of their success. The late Lord Coleridge (amongst others) was of opinion that to attend a lecture was no better than to read a text-book; indeed, he thought it was not so good, because you could look back at a book and, if need be, make a mark in it, whereas he maintained that if you listened to a Professor and once began to think, you were in danger of missing the next point. The same thought is expressed in the epigram (I think of Schleiermacher), "that Professors are the only men who dare to ignore the invention of the art of printing." For my part, I do not agree with these wholesale strictures. To any one who, for the first time, approaches so complex a subject as law, its field seems entirely beyond his grasp. The office of the lecturer is to take him by the hand and guide him across the undiscovered country. Text-books (and there are many excellent ones) no doubt do this in a measure, but a book is a dead abstract thing; a lecture is, or should be, something living and growing. Of course, there are lectures and lectures. There are men with great learning who will always fail to hold an audience. There are men with not much learning, but with an attractive personality, who will always succeed in doing so.

A lecturer, whatever his subject, should not read from a manuscript. Although his discourse should never be impromptu, he should contrive to give it that air. A few notes, indeed, he should have before

him, for they will prevent him going astray. But, provided he is master of his subject, this is all the written aid he requires, and all of which he should avail himself. Again, a lecturer should be on his guard against a too rapid delivery. He should allow his audience time to think, bearing in mind that what is familiar to him is, probably wholly new to them. The most effective oral lecture I ever attended, when I was an undergraduate at Oxford, was delivered on a branch of Moral Philosophy by a very original thinker, who hesitated and stumbled over his words in a most surprising way. I can even at this distance of time recall the vision of the Professor struggling to express the thoughts within him, and so magnetic was his power, that I felt myself struggling too. That lecture I never forgot, for when I left the class-room I felt as if I had given it myself.

Another point to be noticed about lectures is that the audience should be dissuaded from taking copious notes whilst the lecture is proceeding. At most they should jot down a few catchwords in order to aid the memory. Mr. W. Blake Odgers, in his evening lectures on libel, adverted to in a note on a previous page, improved on this idea. When he entered the class-room on his opening night he found there about a hundred students, armed with pens, ink and paper, ready to take down as much as possible of what he was about to say. His first sentence rather astonished them. He requested them to put all this apparatus on one side and to give him their undivided attention. They would find, he said, no note-making necessary, for at the close of the lecture he would hand to each of them a printed *résumé* prepared by himself which they would find much more accurate than any they could make on the spur of the moment.

As an alternative to a formal lecture, it will be found useful occasionally to expound cases decided by the Courts. The teacher selects from the Reports some well-known authority illustrative of a legal principle, he examines the arguments *pro* and *con*, and occasionally appeals to the class to know how they would themselves decide it. Sometimes, to make the appeal more forcible, he asks for a show of hands in favour of the plaintiff and defendant respectively. The system of teaching by "Cases" is a favourite one in America, and Mr. Justice O. W. Holmes, who occasionally acts as Harvard Professor, is one of its warmest supporters.

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The conclusions to be drawn are, I venture to think, these :—

1. That theoretical or non-professional law should, in accordance with the practice of other nations, be taught in England both as part of a liberal education and as introductory to, and closely connected with, technical or professional law.

2. That theoretical law is not at present adequately taught by the Inns of Court, and by reason of the strictly professional character of those Inns, cannot be so taught.

3. That, to remedy this defect, it is expedient that a Faculty of Law should be established in London as part of a Teaching University, and that such Faculty should teach both non-professional law so far as the latter is capable of being taught by lectures and classes.

4. That with regard to so much of professional law as can only be learnt by actual contact with business, a probationary system, modelled on the lines of the Continental *stage* should be set on foot by the Inns of Court or the General Council of the Bar, or by both conjointly.

5. That, to avoid the multiplication of tests, the Faculty of Law in the Teaching University should recognize and give full effect to examinations *in pari materia* held and passed in any other University within the British Dominions.

6. That the Inns of Court and the Incorporated Law Society should be properly and adequately represented on the proposed Faculty of Law and the other Councils of the University, and should, in return, contribute to the funds of the University, according to their means.

7. That the privileges and powers both of the Inns and of the Law Society, as licensing and disciplinary authorities, should remain unaffected by the proposed reform, the object being not to curtail, but to enlarge the dignity and usefulness of those important bodies.

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The Late Sir Frank Lockwood :—Some six years ago a man and his wife sued an omnibus company for £500 in respect of injuries caused to the wife by the neligence of one of the company's servants, and the case was presented to the jury in a grossly exaggerated form. The evidence of special loss or expenses was exceedingly vague and slight, but the husband declared that his wife, who was a very fat woman, weighing some fifteen stones, had prior to the accident weighed eighteen stones. It appeared at the hearing that, immediately after the accident, the husband had written to the company alleging that his wife's injuries would

certainly prove fatal, and claiming £50 compensation, a proposal which the company declined to entertain. Lockwood, for the defendants, went to the jury in this strain:—"I will spare you further trouble in this matter, gentlemen, by at once accepting the plaintiffs' estimate of any damage they may have sustained. The case, you will perceive, resolves itself into an application of the principle known, I believe, to arithmeticians as the rule of three. Its operation here is very simple. When the husband regarded the accident as certain to prove fatal he claimed, as we find, £50—that, you will observe, was as for a 'total loss.' His wife—at any rate the bulk of her—has fortunately been spared to him, and she apparently enjoys, at the present time, the most robust health, though her spouse complains that, whereas she formerly scaled eighteen stones, her weight has now been reduced to fifteen—a loss of three stones avoirdupois. The problem for you to solve, therefore, stands thus: As eighteen is to three, so is £50 to the amount of your verdict. With the assistance of my learned junior I am able to propound as a solution of the problem—£8 6s. 8d. But, as my clients have throughout desired to deal with the plaintiffs in a more liberal spirit than you will probably consider they deserve, let us say in round figures £10." The Judge was highly amused, and briefly intimated that the question was eminently one for the jury, who promptly stated that they accepted "Mr. Lockwood's figure of £10":—*The Law Magazine and Review.*

REVIEWS.

The Principles of the Law of Sedition, by J. Chaudhuri, M.A., Bar.-at-law, published by *The Weekly Notes Printing Works, Calcutta*: Price Rs. 1:—This little book is practically a reproduction of the various articles which appeared in the *Calcutta Weekly Notes* during the time of the introduction of the Sedition Bill in the Imperial Legislative Council. They were much appreciated at the time as embodying most thoughtful utterances upon the subject. The book contains an exposition of the English law of sedition and a discussion of the law in force in this country before and after the passing of the Sedition Act. A cursory reading of the book will convince any reader that the law has been seriously altered to the prejudice of the subject and that the alteration is at variance with the spirit and letter of the English legislation. It is much to be regretted that the responsible members of the Government in this

country lost their heads over a trifling incident and made an enormous change in the law almost in a state of panic, forgetting the far-reaching consequences of such mischievous legislation. If the affections of the people have at all been alienated, statesmen of a future age will find that the press prosecutions and sedition legislation have been more responsible than anything else for that result. We congratulate Mr. Chaudhuri on the publication of this little book.

The Law of Meetings, by George Blackwell, LL.B., published by *Butterworth & Co.*, *7, Fleet Street, London, E. C.*, Price, s. 2-6 :—This is a useful little publication. We feel sure that the various public bodies in this country, such as Municipal Councils, Local Fund Boards and Devastanam Committees, will derive considerable assistance from the book. To the practising lawyer, however, it is much too meagre to be of much service. We expected to find a statement of the principles of the common law with regard to the procedure of meetings. The decisions passed in England with reference to special statutes, unless there is an exposition of the principles of the common law which may be supposed to underlie the provisions of the special enactments in this country, are not likely to be of much use. We may, however, confidently recommend a study of the book to a member of any of the public bodies above mentioned.

The Presidency Small Cause Courts Act, by C. V. Visvanatha Sastri, B.A., B.L., and K. Krishnamachari, B.A., B.L., published by the *Vaijayanti Press, Mount Road, Madras.* Price, Rs. 1-8 :—This is a very unpretentious commentary and should prove of use to practitioners in the Small Cause Court and the High Court. The case-law is noted up carefully and with a considerable amount of conciseness. The typography and get-up do credit to the *Vaijayanti Press.*

The Madras Law Journal.

PART IV.] APRIL 1898. [VOL. VIII.

ILLEGITIMATE SON OF A SUDRA.

The right of illegitimate sons in general to maintenance has been dealt with in a previous article [*vide* 7 M. L. J., 363]. The Hindu Law confers on the *dási-putra* of a Sudra the right to inherit to his putative father under certain circumstances.

The following are the Hindu Law texts on the subject:

I. Mitakshara.

1. The author next delivers a special rule concerning the partition of a *Sudra's* wealth.

a. "Even a son begotten by a *Sudra* on a female slave, may take a share by the father's choice.

But if the father be dead, the brethren should make him partaker of the moiety of a share; and one, who has no brothers may inherit the whole property in default of daughter's sons."—Yajnavalkya 133 *a*—134).

2. The son begotten by a *Sudra* on a female slave obtains a share by the father's choice or at his pleasure. But, after the [demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share, that is, let them give him half [as much as is the amount of one brother's] allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But if there be such, the son of the female slave participates for half a share only.

3. From the mention of a *Sudra* in this place, [it follows that] the son begotten by a man of a regenerate tribe on a female slave does not

obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile, he receives a simple maintenance.

II. Dayabhaga.

"If a son is born to a *Sudra* by a slave woman (or dasi), or by a slave's slave woman (*Dasa-dasi*), he may if permitted take one share. With these words the rule of right is established."—Manu IX, 179.

But the son of a *Sudra* by a female slave or other unmarried *Sudra* woman, may share equally with other sons by consent of the father. Thus Manu says: " A son begotten by a man of the servile class on his female slave or on the female slave of his slave may take a share of the heritage, if permitted: thus is the law established. IX, 179.

Without such consent, he shall take half a share, as Yajnavalkya directs; " even a son begotten by a *Sudra* on a female slave, may take a share by the choice of the father; if the father be dead, the brethren should make him partake of half a share," (2, 134).

Begotten on an unmarried woman, and having no brother, he may take the whole property; provided there be not a daughter's son. So Yajnavalkya ordains: " One who has no brother may inherit the whole property, for want of daughter's sons," (2, 135).

But if there be a daughter's son, he shall share equally with him; for no special provision occurs, and it is fit that the allotment should be equal; since the one, though born of an unmarried woman, is son of the owner, and the other, though sprung from a married woman is only his daughter's son.

III. Dattaka Chandrika.

Since, in the following texts of Manu and Yajnavalkya respectively, a share equal to that of the legitimate son is prescribed for the son even by a female slave of a man of the class in question (*Sudra*); and the co-heirship with the daughter's son of such son only when having no brother is intimated; the equal partition of the son of the wife, the son given and the rest, with the real legitimate son whilst the father lives, and their succession to the moiety of the share of such son, where the father may be dead at the time of partition, follow *à fortiori*. And otherwise, there would be a great inconsistency if, where the son of the wife, the son given and the rest took the fourth of the share of the legitimate son, the son by a female slave whose title is infinitely inferior in respect to these were to take an equal share with the legitimate son (Manu and Yajnavalkya are then quoted).

If according to this authority, where there be no son of the wife and the rest, but there may be a wife and daughters, the daughter's son be entitled to share [with the son by a female slave] the rule for the succession of the daughter [or other proper heir] would be infringed; therefore, if any even in the series of heirs down to the daughter's son exist, the son by a female slave does not take the whole estate; but on the contrary shares equally with such heir.

Upon the above texts, the first question that presents itself for discussion is as to the definition of *dāsī-putra*. On this point, there is a direct conflict between the High Court of Calcutta on the one hand and the High Courts of Bombay, Madras and Allahabad on the other. In Bengal only the illegitimate son by an unmarried female *slave* can inherit to a Sudra; and as slavery has become impossible after Act V of 1843, this part of the law has become obsolete, (*Narain* v. *Rakhal*, I. L. R., 1 C. 1; *Kirpal Narain* v. *Sukurmoni*, *Ib.*, 19 C. 91). In Madras, Bombay and Allahabad, the word, *dāsī-putra* includes not only the son by a female slave, but a son by any unmarried Sudra woman kept as a continuous concubine. (*Rahi* v. *Govind*, I. L. R., 1 B. 97; *Sadu* v. *Baiza*, I.L.R., 4, B. 37, 44; *Pandaiya* v. *Puli*, I. M. H. C. R., 479; *Inderun* v. *Ramasamy*, 13 M. I. A., 141; *Muthusamy* v. *Venkatasubba*, 2 M. H. C. R., 293; S. C., on appeal 12 M. I. A. 203). It is needless to discuss the authorities on this question very minutely. It seems to be pretty clear that the view of the Calcutta High Court is supported by the Sanskrit texts, while that of the other High Courts is in accordance with the altered consciousness of the people subsequent to the time of the text writers. (Sarvadhikari pp. 938-942).

In early times, illegitimate sons born of a permanent concubine of a Sudra seem to have held a position intermediate between that of a legitimate son and that of a bastard born of a mere promiscuous or illicit intercourse. Such a concubine would generally be a slave absolutely under the man's control and the union between them was not illegal. Legality, or rather, absence of illegality, continuousness and exclusiveness are characteristics of the connection necessary to entitle the offspring thereof to rights of inheritance. Accordingly, it has been held that the son born of an incestuous or adulterous connection is not entitled to inherit. (*Dattiparisi* v. *Datti Bangaru*, 4 M. H. C. R., 204, 215; *Venkatachalla* v. *Parvatham*, 8 M. H. C. R., 134; *Rahi* v. *Govind*, I. L. R., 1 B. 97; *Kuppa* v. *Singaraveloo*, *Ib.*, 8 M. 325; *Dalip* v. *Ganput*, *Ib.*, 8 A. 387).

During the father's life-time the illegitimate son of a Sudra may, if the father chooses, be given one share, along with the legitimate sons. The matter is one entirely in the discretion of the father. The illegitimate son has no legal right and cannot sue the father for partition. His share, if he is given one, would be equal to that of a legitimate son.

After the demise of the father, if there be sons of a wife, the illegitimate son of a Sudra participates for half a share. As against the legitimate sons, he is entitled as of right and can enforce a partition by suit. (*Sadu* v. *Baiza*, I. L. R., 4 B. 44, 45; *Thangum Pillai* v. *Suppa Pillai*, *Ib.*, 12 M. 401; A. S. 84 of 1885, unreported.)

According to the texts quoted above, the share of the illegitimate son will have to be fixed as follows: He would get half of what he would get if he were legitimate. If there are more illegitimate sons than one, the share of each will be half of what he would get if all of them were legitimate. If there is one illegitimate son and one legitimate son, the former will get one-quarter share. If there are two legitimate sons, he will get one-sixth. If there are two illegitimate sons and one legitimate son, the former will get each one-sixth. If there are x illegitimate sons and y legitimate sons, the share of each illegitimate son will be $\frac{1}{2(x+y)}$ of the whole inheritance. (Mayne, S. 407).

But here, as in the mode of calculating the share of an adopted son when there is a subsequently born *aurasa* son, there is a difference of opinion. The share of an illegitimate son is said to be half of what the legitimate son actually gets. If there is a number of illegitimate sons and legitimate sons, each one of the former will get half of what each one of the latter gets. If there is one illegitimate son and one legitimate son, the former will, according to this view, get one-third and the latter two-thirds. If there are two legitimate sons, the illegitimate son will get one-fifth and each of the legitimate sons will get two-fifths. If there are two illegitimate sons and one legitimate son, each of the former will get one fourth and the latter half. If there are x illegitimate sons and y legitimate sons, each illegitimate son will get $\frac{1}{x+2y}$ of the inheritance. (W. and B. 381, 384; *per curiam*, *Sadu* v. *Baiza*, I. L. R., 4 B. 52; *Joyendra Bhupati* v. *Nityanand Man Sing*, *Ib.*, 11 C. 715).

There is no case actually deciding this point. Although the Bombay and Calcutta High Courts seem to be inclined to take the latter view, the former view appears to be the more natural and correct one.

The law as to the rights of an illegitimate son of a Sudra when there is no son by a wife is not quite settled—at least out of the Madras Presidency. The texts quoted above seem to lay down the law as follows: An illegitimate son having no brothers takes the whole estate if there be no widow, daughter or daughter's son. He would exclude the heirs who, according to the ordinary rules of the Hindu Law of Inheritance, come in after a daughter's son, *viz.*, mother, father, brother, &c. But if there be widow, daughter or daughter's son, he takes half the estate, the other half going to the widow, daughter or daughter's son as the case may be, just in the same way as the whole of the inheritance would have gone if there were no illegitimate son. *Chinnammal* v. *Varadarajulu* (I. L. R., 15 M. 307) is a decision on this point. There the widows of a shrotriemdar, a Sudra, sued his illegitimate son for a declaration that they were entitled by inheritance to the whole of the shrotriem of which they alleged they were in possession. The defendant claimed to be legitimate and pleaded that the suit was bad as he was in possession and no consequential relief was prayed for by the plaintiffs. The District Judge found defendant legitimate and in possession, held the suit unsustainable by reason of the proviso to S. 42 of the Specific Relief Act and dismissed the suit. On appeal the High Court reversed the District Judge's decision on the two points decided by him and the question consequently arose whether the plaintiffs were entitled to succeed to the whole or half of the estate as against the illegitimate son. Their Lordships (*Collins*, C. J., and *Handley*, J.) made a declaration that the plaintiffs were entitled to half the estate holding as the general result of the authorities so far as they were agreed, that, if there be a widow, daughter or daughter's son and an illegitimate son, the latter takes half the estate leaving the other half to be enjoyed as woman's estate by the widow, daughter or daughter's son in succession. The same view had already been taken by the Madras High Court in *Krishnayan* v. *Muthusawmy* (I. L. R., 7 M. 407); *Ranoji* v. *Khandoji* (I. L. R., 8 M. 557), and *Parvati* v. *Thirumalai* (I. L. R., 10 M. 334)—though this point did not actually arise for decision in those cases.

There cannot be any doubt that the view taken by the Madras High Court is the correct one. It puts a natural construction on the language of the Sanskrit texts and the conclusion arrived at is quite in harmony with the general principles of the Hindu Law of Inheritance. But the Bombay and the Calcutta High Courts have taken a different view, and, though the point has not been actually decided by them, they are strongly of opinion that the *dasi-putra* of a Sudra would exclude the widow altogether. The following are the considerations on which this view is based:—

(1) At an early stage of Hindu Law the daughter's son—especially the son of an appointed daughter—ranked above the widow, and the daughter like other sons. Vijnanesvara whose work belongs to this stage says that the illegitimate son of a Sudra takes after him. Vijnanesvara introduced a change by placing the daughter above the daughter's son. Among the regenerate classes among whom the higher forms of marriage prevailed and the wife shared her husband's sacrifices, the widow was in course of time given a place before the daughter. But among Sudras, the wife did not occupy so high a place and she has continued to hold the position originally allotted to her.

(2) The Mitakshara omits to mention the widow as one of those who share the estate equally with the illegitimate son.

(3) In dealing with different classes of heirs, Vijnanesvara takes up the succession of sons, principal and secondary, and on failure of them, then the order of succession among all tribes and classes. Ch. I., Section XII., which deals with the topic in hand, is the last section of Ch. I. which deals with sons and Ch. II. begins thus: "That sons, principal and secondary, take the heritage, has been shown. The order of succession among all tribes and classes is next declared." Then the widow and other heirs are mentioned. The illegitimate son being one of the secondary sons and being mentioned before the widow and other heirs, the widow is entirely excluded by the illegitimate son of a Sudra.

We shall deal with these considerations in their order.

(1) This theory, for which West and Buhler alone are responsible, seems to be no more than a gratuitous assumption. There is absolutely no authority for it. No decision, no text-writer is

quoted in support of it. The Bombay High Court, no doubt, have given countenance to this theory. But they do not quote any other authority than West and Buhler. As this subject has been dealt with at length in 1 M. L. J., 66, we do not go into it in greater detail.

(2) The next argument is that based on the omission of the widow from the list of heirs who share with the illegitimate son. But this omission is quite inadequate to justify the conclusion arrived at. It does not appear to be necessary to suppose that, in the case of an illegitimate son intervening, Vijnanesvara upset the usual order of inheritance under which the widow would come in before the daughter and daughter's son. On the other hand, the omission is easily explained. Yajnavalkya mentions the daughter's sons as excluding the illegitimate son as to half the estate. Vijnanesvara mentions the daughters also. Obviously the meaning is until the line of heirs according to the ordinary Hindu Law ending with the daughter's son is exhausted, the illegitimate son does not take the whole estate but only half. It is unnecessary to mention the widow who stands in the order of succession next before the daughter. This is what Nandapandita expressly lays down. (Dattaka Chandrika, V., 30, 31). It seems to us that it may with better reason be argued from the omission of the widow that she excludes the illegitimate son altogether. The rule that gives the illegitimate son of a Sudra a share is an exceptional one. It should, therefore, be strictly construed so that the rights of persons not expressly said to be affected thereby would remain intact. The widow not being mentioned would not be affected by the rule and would exclude the illegitimate son altogether.

(3) The argument from the position of the passage in question in the Mitakshara appears on the face of it unsound. It goes too far. If it were good, the illegitimate son would exclude not only the widow but the daughter and daughter's son as well. The Bombay High Court takes this anomalous result as intended by the text writers and attributes it to their arbitrariness of arrangement and faulty exegetics. The solution of the question offered by the Madras High Court in I. L. R. 15 M. obviates all the difficulties on which one is landed by following the line of argument adopted by the Bombay High Court.

[*Rahi* v. *Govinda*, I. L. R., 1. B. 97; *Sadu* v. *Baiza*, 4 B. 37; *Jogendro Bhupati* v. *Nityanund Man Sing, Ib.* 11 C. 702; *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanund Man Sing, Ib.* 18 C. 152; *Krishnayan* v. *Muthusawmy*, I. L. R., 7 M, 407; *Ranoji* v. *Khandoji*, I. L. R., 8 M 557; *Parvati* v. *Tirumalai*, I. L. R., 10 M. 334; *Shesgiri* v. *Girewa*, I. L. R. 14 B. 282; *Chinnammal* v. *Varadarajulu*, I. L. R., 15 M. 307; Mayne, paras. 506, 507.]

It should be noted that, where there is an illigitimate son, a widow and a daughter, the half inherited by the widow would descend to the daughter after her, and on the daughter's death, would revert to the legitimate son. But if there be a daughter's son, and if he inherit the half, it cannot revert to the illegitimate son, as the heir that will take the estate will be the heir of the daughter's son.

The next question to be dealt with relates to the co-parcenary rights of the illegitimate son. The first case that decided the question was *Sadu* v. *Baiza* (I. L. R., 4 B. 37). On the death (in 1850) of Manaji, a Sudra, Mahadu, his legitimate son, and Sadu, his illegitimate son, succeeded to the estate. They lived together for sometime after their father's death, but owing to domestic quarrels, they entered into a written agreement by which Sadu was allowed to enjoy a portion of the family property. They, however, continued joint and undivided in estate until the death of Mahadu in 1865. Sadu sued Baiza and Savitri (Manaji's two widows) and Darya (his daughter) for recovery of the property allotted to him under the agreement and got a decree in 1866. In 1870, he sued as heir of his father and brother and claimed the whole of the ancestral property. It was held that Mahadu and Sadu, having succeeded as co-parceners to the whole of the property, subject to the maintenance of the widows and daughter, the usual result of co-parcenary followed on the death of Mahadu, *viz.*, Sadu took the whole by survivorship. The following circumstances are relied on:—(1) the place in which Vijnanesvara has dealt with illegitimate sons in the Mitakshara; (2) the legitimate and the illegitimate sons being spoken of together as brothers *bhrâtarah*; (3) the postponement of the widow after the illegimate son; (4) his succession jointly with legitimate sons. It is said that these considerations show the recognition of the *dasi-*

putra's status as *son* and, consequently, as co-parcener. It is no doubt conceded that the position of an illegitimate son differs materially from that of a legitimate son : (1) The former cannot enforce partition as against his putative father. (2) As against the legitimate sons he gets only half a share. (3) He does not exclude other heirs as the legitimate son does, but shares with the daughter and the daughter's son. But this difference is held to be not so important as to affect the conclusion arrived at from the points set forth in favour of his co-parcenary rights. Two points relied on by counsel as speaking against the existence of co-parcenary rights are noticed in the judgment. The first, that the *dasi-putra* is not included in the enumeration of heirs given in the Mitakshara (ii. i. 2.) is met by the fact that the placitum only lays down the order of succession *on failure of sons,* a rule of *sapratibandha dáya* or obstructed heritage and, therefore, had no application to the case on hand. The second point, that, as the proportions which plaintiff and Mahadu were each entitled to take were fixed by law, the latter's share upon his death vested in his mother Baiza, was held bad as it went too far, for, if good, it would apply with equal force in every case of death, without male issue, of a co-parcener in an undivided Hindu family. This case was followed in *Jogendro Bhupati* v. *Nityanand Sing* (I. L. R., 11 C. 702). That was the case of an impartible *raj.* A zamindar died leaving a legitimate son and an illegitimate one by a female slave. The former succeeded to the zamindary, and on his death the question arose who was entitled to the zamindary, the illegitimate brother or the three widows or the daughter. It was held that the illegitimate brother was a co-parcener with the last owner and took the *raj* by survivorship on his death. *Sadu* v. *Baiza* was referred to and followed. The Judges who heard the case (*Garth,* C. J., and *Beverley,* J.) feeling that the question was of some difficulty consulted *Mr. Justice Mitter* who arrived at the same conclusion as the Bombay High Court. It was argued on behalf of the widows and daughter that the right of survivorship only obtained in those cases where an interest in joint property is acquired by any member of a joint family at his birth and that a *dasi-putra* could not have such a right as it was only by the father's choice or pleasure that he could obtain any share at all; and that the Mitakshara (Ch. I, S. 12) placed the *dasi-putra* in the same category and gave him the same sort

of rights as a daughter or daughter's son and, like them, the *dasi-putra* had no right of survivorship, though he might take the property as heir to his father. Their Lordships without saying anything about these arguments, held that the rule laid down in the Bombay case was correct and most consistent both with justice and authority. They observed that as illegimate sons by different mothers would all jointly participate in the property and would succeed to each other by survivorship *inter se*, there was no reason why they should not succeed in the same way to a legitimate half-brother. Reference was made to the position of the adopted son to which the position of an illegitimate son bore an analogy, in both cases there being the same sort of imperfect brotherhood to the legitimate son and in both the superior position of the legitimate son being recognized by his taking a larger share on partition. *Krishnayan* v. *Muthusami* (I. L. R., 7 M., 407) was distinguished on the ground that, in that case, the dispute was between the illegitimate son and his putative father's brother. The case went up to the Privy Council on appeal and the decision of the Calcutta High Court was confirmed (I. L. R., 18 C., 151). Their Lordships of the Privy Council simply follow the Bombay and the Calcutta rulings. *Thangam Pillai* v. *Suppa Pillai* (I. L. R., 12 M., 401) does not decide this point. It is an authority only for the proposition that an illegitimate son of a Sudra can compel a partition as against his legitimate brothers which he cannot do as against his putative fathers. This is quite consistent with his having no co-parcenary rights.

No doubt, the question is now practically concluded by authority. In the face of the Privy Council decision (I. L. R., 18 C., 151) it would be impossible to contend in any Indian Court that a *dasi-putra* of a Sudra and his legitimate son are not members of a co-parcenary. But with due deference to the august tribunal that decided the question, we venture to doubt whether I. L. R., 18 C., 151, has been rightly decided.

According to the Mitakshara, the right of the son arises by birth. And it is quite conceded on all hands, *Jogendro Bhupati* v. *Nityanand Man Sing* (I. L. R., 18 C. at p. 155 P. C.,) that the illegitimate son of a Sudra takes no vested interest by birth. During the father's lifetime, the illegitimate son's claim to half a share depends entirely on the father's sense of justice or generosity. There cannot be any co-parcenary then as between the illegitimate son on the one hand and the putative father

and the legitimate sons on the other. How can the death of the father convert him into a co-parcener which he was not before? No doubt, it has been held that the illegitimate son can compel partition as against the legitimate sons—though it is extremely doubtful whether even this is warranted by the Sanskrit text. But taking it to be so, it would appear to be more natural to infer that it was simply intended to make what would be an act of mere good sense or generosity on the part of the father, an act of duty on the part of the legitimate sons which they were bound to do, *Thangam Pillai* v. *Suppa Pillai* (I. L. R., 12 M., 403). It is very difficult to find any idea of co-parcenary here. Further, one of the chief arguments relied on was the postponement of the widow after the illegitimate son. But the Madras High Court has expressly dissented from their view (I. L. R., 15 M.) and some of the other arguments are precisely those which in the opinion of the Bombay High Court pointed to the total exclusion of the widow by the *dasi-putra*. The conception of co-parcenary pre-supposes *sapinda* relationship and a legal marriage. It is on this principle that the Madras High Court has decided that an illegitimate son cannot claim any share where the property of his father has passed by survivorship to an undivided brother (*Krishnayyan* v. *Muttusami*, I. L. R., 7 M., 407). The analogy between the position of the illegitimate son and that of the adopted son is erroneous and cannot be acted upon. "If the adopted son takes a smaller share in competition with the legitimate son, it is because he is a mere substitute provided by a fiction of law, whilst in the case of the *aurasa* there is actual blood-relationship consecrated by legal marriage. In default of a legitimate son, the fiction operated as a special rule of law to give the adopted son the same status in the family as against every one of its members. On the other hand, save as to taking an inferior share, there is no analogy between him and the illegitimate son." (I. L. R., 10 M., 345.) We are inclined to doubt very much if the Privy Council would have decided as they have done if they had the views of the Madras High Court in I. L. R., 15 M., before them.

The illegitimate son is heir only to his father and takes only to *his* estate. He has no right to the estate of collaterals, either by inheritance or by survivorship. The Hindu law recognizes no relationship between the illegitimate son and his father's kindred. And since he takes no interest by birth, his right by inheritance to his father's estate lapses by survivorship in favor of

his surviving co-parceners and, therefore, he cannot sue his brothers or nephews for a partition after his death. (2 W. Mac N. 15, n; *Nissar* v. *Kowar*, Marsh 669; *Krishnayyan* v. *Muttusami*, I. L. R., 7 M., 407; *Ranoji* v. *Kandoji*, I. L. R., 8 M., 557; I. L. R., 12 M. at 403.) But when there are legitimate and illegitimate sons, they take together as co-parceners. When they have once taken jointly, the illegitimate son takes, on the death of the legitimate son without issue, the whole by survivorship, superceding the widow altogether. (*Sadu* v. *Baiza*, I. L. R., 4 B., 37; *Jogendro* v. *Nittyanand*, I. L. R., 11 C., 702, affirmed, I. L. R., 18 C., 151.)

Under the Hindu Law, the bastard is not a *nullius filius* as in the English Law and consequently bastards are not prevented from claiming to each other. (1 M. H. R., 478.) If two bastards take jointly, on the death of one, the other takes the estate by survivorship. (*Mayne Bai* v. *Uttaram*, 2 M. H. R., 196; *Myna Boyee* v. *Ootaram*, 8 M. I. A., 400; *Sivasangu* v. *Minal*, I. L. R., 12 M., 277; *Narasanna* v. *Gangu*, I. L. R., 13 M., 133.) There cannot be any doubt as to the existence of heritable blood as between bastards and their mother.

T. JIVAJI.

TRANSLATION FROM THE VIVADARATNAKARA.

CHAPTER XXXI.

On Sons by Analogy.

On this subject Manu says: "If, among brothers of the full blood, one have a son, Manu has declared them all to be fathers by virtue of that son. If, among many wives of a man, one has a son, Manu has declared them all to be mothers by virtue of that son."(1)

Brihaspati says "Where there are many uterine brothers born of the same father and even if one of them has a son, all the brothers are declared to be fathers by virtue of that son. The same rule is declared to apply in the case of many wives of the same husband. If one of them has a son, that son shall offer the *pinda* to them all."(2) *Commentary*—Here Asahāya observes that where men have a brother's son and women a cowife's son, they should not make substitutes for sons such as *kshetraja*, etc. Pārijāta says to the same effect. And Udayakāra in his commentary says the same thing.

Here ends the chapter on 'sons by analogy.'

(1) Manu, IX, 182. (2) Brihaspati, Chap. XXV, 99 and 100.

CHAPTER XXXII.

On the Etymology of the word 'Putra.'

On this subject Manu and Vishnu say: "As the son redeems his father from the hell called *Put*, he has been called *Putra* by the Creator himself."(1)

Hárīta says: "There is a hell called *Put* and the sonless man is there tormented. And as a son redeems the father from that hell, he is called *Putra*."(2)

Brihaspati says: "Because a son redeems his father from the hell called *Put* even by the sight of his face, a man should be anxious for the birth of a son. The grandson and the son of the appointed daughter both make him attain heaven. Both are pronounced equal in the matter of inheritance and the offering of *pinda*."(3)

Manu and Vasishtha say: "If the father should behold the face of his son born alive, he shifts the burden of debt on him and attains immortality."(4)

Sankha, Likhita, and Paithinisi say: "By a son produced any where, the father prospers and becomes freed from all debt by the *pinda* which he offers to the ancestors."(5)

Hárīta says: "He who has a son, pure, capable, virtuous even in the first years of his life and able to correct his own faults, transports his ancestors beyond the regions of torment."(6)

Sankha and Likhita say: "The regular performance of Agnihotra, the study of the three Vedas and the performance of sacrifices during which rewards by the hundred had been given, do not secure a sixteenth part of the benefit which flows from the birth of the eldest son. Heaven is in his hands who is celebrated as the sire of a son and a grandson and the living father of many sons and who has not omitted to study the Vedas or perform the sacrifices."(7) *Commentary*—'Akshunna' means 'not omitted.'

(1) Manu, Chap. IX, 138. (2) Cole. Dig., Vol. II.
(3) Brihaspati, Chap. XXV, 36 and 37. (4) Vasishtha, Chap. XVII, 1.
(5) Cole. Dig., Vol. II, 385, CCLXX. (6) Cole. Dig., Vol. II, 420, CCCVII.
(7) Cole. Dig., Vol. II, 420, CCCVIII.

Sankha, Likhita, Vishnu, Vasishtha and Hárīta say: "By a son, a man conquers all the worlds. By a son's son, he attains immortality and by a son of that grandson, reaches the Solar abode."(1) *Commentary*—'Bradhna' means 'Sun.'

Yājnavalkya says: "By a son, a grandson and a grandson's son, a man obtains worlds, immortality and heaven. Therefore, women must be honoured, attended to, maintained and well-protected."(2)

Vasishtha says: "Infinite are the worlds to him who has sons. The Srutis declare that there is no heaven for him who has no son. A form of curse is 'Let them die childless and be evil eaters.'"(3) *Commentary*—'Childless' means 'sonless.' 'Be' means 'become.' 'Eaters,' *i.e.*, 'evil spirits prone to eating.' It means that it is a great punishment, if, for want of a son, one should become an evil spirit. The being sonless is the destruction of enemies; so a son is desired.

This is also said: "A blessing is also thus craved—'let me attain immortality by means of issue.'"(4) *Commentary*—Prakása-kára says that the previous curse is hurled at enemies and this blessing craved for one's self.

It is said: "The son's son and the son of the appointed daughter lead to bliss and are declared equal in the matter of inheritance and offering of *pinda* and water. The sonless man should somehow strive to beget a son of any description for the offering of *pinda* and libations of water and also for the celebrity of his name. Ancestors, afraid of being thrown into hell, anxiously expect sons in the hope that one of them may travel to Gaya and transport them beyond the region of torment, that he will perform Vrishot-sarga, Gayasraddha and Ishthapurtha ceremonies, that he will protect them in their old age and propitiate them every day. As a man trying to cross a stream with a bad boat sinks, just so the father of a bad son sinks in eternal gloom."(5)

Here ends the chapter on the Etymology of the word 'Putra.'

(1) Cole. Dig., Vol. II, 520, CCCIX. (2) Yajnavalkya, Chap. I, 78.
(3) Vasishtha, Chap. XVII, 2, 3 and 4. (4) Not found.
(5) Not found—attributed to Manu in some places.

CHAPTER XXXIII.

On Contemptible Sons.

On this subject, Manu says: "The son begotten upon the wife of another not authorised and the son begotten on the mother of a son by her brother-in-law are unfit to share in the inheritance, being the son of an adulterer and being produced through lust respectively."(1) *Commentary*—'Anuyuktāsutah' means 'the son begotten upon a woman authorised neither by her husband, nor in default of him, by her Guru.' 'Share in the inheritance' means 'share in the wealth of the owner of the soil.' This also indicates his unfitness to offer *pinda,* etc. Considering the text of Nārada which follows, this text applies to sons begotten upon a wife to whose husband no fee had been paid (by the begetter).

Manu again says: "Even the son begotten upon a woman appointed to raise offspring, if begotten in violation of the rules, is unfit to share in the paternal wealth; for he was begotten by an outcast."(2) *Commentary*—'Avidhánatah' means 'not according to the rules prescribed in the matter of Niyoga.'

Gautama says: "The son begotten upon a woman by another while her brother-in-law is alive takes no share."(3) *Commentary*—A son begotten by another upon a woman whose brother-in-law is alive, takes no share.

Nárada says: "Sons begotten by one or by many upon a woman not authorised are not entitled to share the wealth. They are all sons of their begetters only. They shall offer the *pinda* to their begetters in case a price had been paid for their mother. If no price had been paid, they shall give the *pinda* to the husband of the mother."(4) *Commentary*—'Anuyuktáyam' means 'unchaste from desire.' They shall take no shares, *i.e.,* do not inherit the wealth of the owner of the soil. Prakásakára, however, says that they do not inherit the wealth of their mothers, their mothers' husbands and their maternal grandfathers. As for the right to offer *pinda,* they should offer it to their begetter where a price had been paid for their mother, *i.e.,* where the owner of the

(1) Manu, Chap. IX, 143. (2) Manu, Chap. IX, 144.
(3) Gautama, Chap. XXVIII, 23. (4) Narada, Chap. XIII, 19 and 20.

seed had taken their mother after paying a price to her husband. The last provision of the text is but reasonable.

Nárada in speaking of the twice-married woman and the adulteress says: "The son begotten on such of these women as have been bought for a price belongs to the begetter. But the son of those for whom no price was paid belongs certainly to the husbands of such women."(1)

Manu says: "Where two sons begotten by two different fathers contend for the property in the hands of a woman, each shall take to the exclusion of the other what belonged to his father."(2) *Commentary*—The woman here meant is neither a prostitute nor a twice-married woman nor an adulteress. So says Párijáta.

Here ends the chapter on contemptible sons.

CHAPTER XXXIV.

On Inheritance to the Wealth of the Sonless Deceased.

On this subject Manu says: "The widow of the sonless deceased shall raise up to him a son by one of the same *gotra* and deliver to that son the whole wealth of the deceased."(3) *Commentary*—The wife of the sonless deceased shall raise up an offspring to him by her brother-in-law or other *sapinda* and deliver to that son all the property which belonged to her husband and shall not appropriate it herself. So says Párijáta; but Prakásakára says that the king should send for that son through a *sagotra* and give him all the property. In the result, there is no difference.

Vriddha Manu says: "A widow who has no male issue, who keeps the bed of her lord inviolate and who faithfully discharges the duties of her widowhood shall alone offer the *pinda* and inherit all his wealth."(4) *Commentary*—'Having no male issue,' *i.e.*, of any of the twelve kinds enumerated. 'Vrite' means 'in the duties of widowhood.'

Brihaspati says: "In the holy writ, in law and in the practice of the world, a wife is declared by sages to be half the body of her

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(1) Narada, Chap. XII, 54. (2) Manu, Chap. IX, 191.
(3) Manu, Chap. IX, 190. (4) Cole. Dig., Vol. II, 535, CCCCVIII.

husband, sharing equally the fruit of pure and impure acts. Of him whose wife is not dead, half the body lives. How should any one else take his wealth, while half his body lives? Although there are his *sakulyas*, his father, mother, and uterine brothers, the wife of the sonless deceased inherits his wealth. A wife dying before her husband takes away his consecrated fire (Agnihotra) and dying after him she takes, if faithful to him, his wealth. This is an eternal law. Having taken all his moveable and immoveable property, the gold, the silver, grain, chariot and clothing, she shall cause to be performed his monthly, six-monthly and other *sraddhas*. Let her propitiate with oblations and pious gifts her husband's paternal uncle, Guru, daughter's son, sister's son and maternal uncle, likewise the aged and the helpless, guests and women of the family."(1) *Commentary*—Some say that even the *Pārvana sraddha* should be performed by a woman. To contradict it the author here enumerates the *sraddhas*, as the monthly, six-monthly, etc: By 'monthly *sraddhas*' is here meant the twelve monthly *sraddhas*. By 'six-monthly *sraddhas*' is meant the two *sraddhas* to be performed within six-months of the death. By the term 'ádi' is meant 'the *sraddha* to be performed on the eleventh day after death, the *Sapindīkarana sraddha* and the anniversary performable each year on the date corresponding to the date of death.' Therefore, she should not perform any other. Otherwise, seeing that these *sraddhas* are enjoined by other texts, this text would become superfluous. The *nich* suffix in 'dhápayet' (shall cause to be performed) is used in *svāarta* as in 'Rámorájyamakárayat,' meaning 'shall perform.' 'Faithful to her lord' means 'chaste.' But Udayakára in his commentary on Manu says that the term 'pativratā' is used in its primary sense and as chastity ends in *Sati*, says that the word 'dhāpayet' means (shall cause to be performed) have no right to perform *sraddha*, etc., many do not zealously care for it. Where there is the chaste wife, she takes the wealth of her sonless husband.

Nārada says that in default of the wife, the daughter is entitled. "In default of sons, the daughter succeeds; because of her continuing alike the lineage. Both a son and a daughter continue the lineage of their father."(2)

(1) Brihaspati, Chap. XXV, 46—51. (2) Narada, Chap. XIII, 50.

Manu says : " As is one's self, so is one's son. The daughter is equal to the son. How can another take the wealth when she, who is one's self, is alive ?"(1)

Brihaspati says : "The daughter like the son springs from the several limbs of a man. How could another person then take her father's wealth while she lives. Equal to her father, and married to one equal to the son, virtuous and attending to his wants and doing him services, she shall take her father's wealth, whether she has been expressly appointed or not.'"(2)

Again Brihaspati says: " When a man dies leaving neither wife nor male issue, the mother should be considered as her son's heiress or a brother with her permission."(3) *Commentary*—' With her permission' means ' with the permission of the mother.'

Manu says : " The mother shall take the wealth of her childless son ; and when even the mother is dead, the paternal grandmother shall take the wealth."(4) *Commentary*—' Childless' here means ' having no son, wife, etc.' The right of the paternal grandmother should be understood to accrue in the absence of the father, the brother and the *sapinda ;* for the right of the father, etc., in default of the mother, etc., is established. ' Dáyádyam' means ' wealth inheritable by heirs.'

Gautama says : " The wealth of the deceased brother not reunited goes to the eldest."(5) *Commentary*—' Not reunited' means ' divided.' If among such brothers one dies without issue, his wealth goes to the eldest brother. This is the meaning. This rule should be understood as applying where the deceased has left no wife, mother or father.

Manu says : " The father shall take the wealth of the sonless son deceased; or the brothers. To three, libations of water must be offered and to three the *pinda* is given. The fourth is the giver of them and the fifth has no concern. To the nearest among the *sapindas* goes the wealth of the deceased. After them all, a *sakulya*, the spiritual teacher or the pupil takes it."(6) *Commentary*

(1) Manu, Chap. IX, 130.
(2) Brihaspati, Chap. XXV, 56 and 57.
(3) Brihaspati, Chap. XXV, 63.
(4) Manu, Chap. IX, 217.
(5) Gautama, Chap. XXVIII, 27.
(6) Manu, Chap. IX, 185, 186 and 187.

—'Sonless' means 'having no sons either primary or secondary.' 'Anantara' means 'nearest.' 'The wealth,' *i.e.*, of the sonless deceased. 'Sakulya' means 'Samānodaka.'

Paithīnisi says: "The wealth of the man dying without male issue goes to his brother. In default of brothers, the father and mother shall take it; or his wife not the eldest or a man of the same *gotra* or a pupil or a fellow-student takes it."(1) *Commentary* —'Not the eldest' means 'one performing some of the duties of a widow and not all of them'; for one of the latter kind is superior to the brother in the matter of inheriting the wealth of the husband. Nor does the word 'wife' include an unchaste woman, because she should be driven away from the family. 'Sabrahmachári' means 'a fellow-student.' As regards the text of Sankha which says that maintenance should be given to women for life, if they keep the beds of their husbands inviolate and that others should be driven away, that applies to women who, without performing the duties of widowhood, are not unchaste. As for the text of Yajnavalkya that parents and brothers likewise inherit, that applies to property acquired by the father, the paternal grandfather, etc. But property acquired without detriment to the paternal wealth goes certainly to the brothers even while the parents are alive.

Devala says: "Next, uterine brothers shall divide the wealth of the sonless deceased, or daughters who are equal, or the father if living. In default of these, brothers equal in class, the mother and the wife in the order mentioned; in default of all these, the members of the family living with him."(2) *Commentary*—'Daughters equal' means 'uterine sisters.' After 'father if living,' 'and desirous' is understood. Here Halāyudha interpreting the expression 'in the order' to mean 'in the order pointed out by Yajnavalkya, etc.,' reconciles the apparent contradiction in the passage beginning with 'this is the gist of the rules on this point.' The list of heirs in their order to the wealth of a deceased sonless Brahmin beginning with the wife and ending with the *Srotriya*, and the list of heirs in their order to the wealth of a deceased sonless non-Brahmin from the wife down to the king have been given. The object of the author of the Kalpataru in quoting the texts of

(1) Cole. Dig., Vol. II, 536, CCCCX. (2) Cole. Dig., Vol. II, 532, CCCCIV.

Yājnavalkya and Vishnu after that of Devala is to show that in interpreting the text of Sankha and Likhita a far-fetched construction should be made and that into the text of Devala which does not prescribe the order among heirs, the order mentioned in the texts of Yājnavalkya and Vishnu should be read. But as a matter of fact there is really no conflict, seeing that the rule of Paithinisi, which says that the wealth of a sonless deceased goes to his brother, applies to property other than that acquired by the father and the paternal grandfather and that the next portion following it, *i.e.*, the mother and the father taking in default of brothers, does not prescribe the order.

Yājnavalkya says: "The wife, the daughters, both parents, the brothers, their sons, kinsmen of the same *gotra*, distant kindred, a pupil and a fellow-student; of these on failure of the first mentioned, the next in order takes the wealth of a sonless man who has gone to heaven. This law applies to all classes." (1) *Commentary* —The meaning is that of the wife, the daughter, the mother, the father, the brothers, brothers' sons, kinsmen of the same *gotra*, distant kindred, a pupil and a fellow-student, in default of those previously mentioned, the one succeeding becomes the heir. The wife here contemplated is the wife possessing excellent qualities. 'Sonless' here means, according to Prakāsakāra, 'having no son, grandson or great grandson.' This is correct according to the legal sense of the term. Although the use of the word 'parents' at the first glance suggests that both the father and the mother have joint rights of inheritance, still seeing that from the text that the mother should be regarded as the heiress of her son dying without wife and male issue, the right of the mother independently of the father and in default of the wife and the male issue is recognised, it is indicated that the father's right accrues in default of the mother.

Vishnu says: "The wealth of a man dying without male issue goes to his wife; in default of her, to his daughter; in default of the daughter, to the father; in default of the father, to the mother; in default of the mother, to the brother; in default of the brother, to the brother's son; in default of the brother's son, to the *Bandhus*; in default of the *Bandhus*, to the *Sakulyas*; in default of them, to

(1) Yajnavalkya Chap., II, 135 and 136.

the fellow-student; in default of him, to the king, except the wealth of a Brahmin."(1) *Commentary*—'*Bandhus*' means '*Sapindas*.' '*Sakulyas*' means 'men of the same *gotra*.' So says Misra.

After speaking of the daughter and her son, Brihaspati says: "In default of these, uterine brothers or brother's sons, agnates, cognates, pupils or learned Brahmins are entitled to the wealth of the deceased. Where a man dies leaving no issue, nor wife nor brother nor father nor mother, all his *Sapindas* shall divide his wealth in due shares. Half of the whole wealth, however, shall be reserved from the division for the spiritual benefit of the deceased and carefully assigned for the performance of his monthly, six-monthly and annual *sraddhas*. When there are several relatives, agnates and cognates of the sonless deceased, the nearest among them shall take his wealth."(2) *Commentary*—The locative case in 'Shánmásikè,' etc., has the force of the ablative.

In respect of the sonless deceased, Apastamba says: "In default of sons, the nearest *Sapinda* takes the wealth. In default of *Sapinda*, the spiritual teacher; in default of him, a pupil, takes it, and shall use it for the benefit of the deceased; or the daughter may take it."(3)

Baudhāyana says: "The great-grandfather, the grandfather, the father, one's self, his son, his grandson and his great-grandson, these they call *sapindas*, being sharers of undivided oblations. The sharers of divided oblations they call *Sakulyas*. Where there are no sons, the wealth goes to the *sapindas*; in default of sapindas, the *Sakulyas* take it; on failure of the Sakulyas also, the spiritual teacher, the pupil or the *ritwik* takes it. In default of all these, the king."(4) *Commentary*—This terminology applies to cases of inheritance and not to cases of pollution, etc. There those who are alike in *pinda* are *sapindas*; and even such of them as are divided would be *sapindas*; but here such as are divided are not *sapindas*. 'Son,' *i.e.*, sons of the body, etc. 'It goes to them' means 'it goes to the *sapindas*.'

Nārada says: "In default of daughters, the *Sakulyas* succeed; in default of them, the *Bandhus*; after them, men of the same

(1) Vishnu, Chap. XVII, 4—13.
(2) Brihaspati, Chap. XXV, 51—62.
(3) Apastamba, II, 6, 14, 2—4.
(4) Baudhayana, I, 5, II, 9—14.

caste; in default of all, the wealth goes to the king, unless it should be a Brahmin's. A king intent on virtue should allot maintenance to his women. Thus has the law of inheritance been declared."(1) *Commentary*—'Sakulyas' are the sons of paternal uncle, etc. 'Sajatyah' means 'men of the same caste.' The rule about maintenance applies to cases of Brahmin women thoroughly indigent.

Manu says: "In default of all, Brahmins versed in the three Vedas, pure and self-controlled, shall take the wealth. So does virtue not diminish. The wealth of a Brahmin should never be taken by a king. This is settled law But the wealth of the men of the other castes, the king may take in default of all. The king except in the case of the Brahmin's wealth, shall take the property to which there is no heir in all cases; but the wealth of an heirless Brahmin he shall cause to be given to learned Brahmins."(2) *Commentary*—'Adāyakam' means 'heirless.'

Baudhayana says: "The wealth of a Brahmin destroys the taker and his sons and grandsons. Poison kills the taker only. Therefore the king should never take the wealth of a Brahmin."(3) *Commentary*—What is called the Brahmin's wealth is the worst of poisons.

Brihaspati says: "The king shall take the wealth of a Kshatriya, Vaisya or Sudra dying without male issue, wife or brother; for he is the lord of all."(4)

Sankha and Likhita say: "The property of a learned Brahmin goes to the Brahmins and not to the king. Wealth dedicated to the Gods or Brahmins should not be taken by the sovereign; nor may he take a deposit, open or sealed, or wealth descending from father to son or belonging to infants or women; for the Veda declares: "The wealth of women or of infants should not be taken by the king, nor the sixfold acquisition of women, nor the patrimony of infants."(5) *Commentary*—The word 'Parishad' means 'Brahmins.' 'Upanidhi' means 'a kind of deposit.' Párijáta says, that 'kramāgatam' means 'inherited from ancestors.' 'Sixfold

(1) Narada, Chap. XIII, 51 and 52. (2) Manu, Chap. IX, 188 and 189.
(3) Baudhayana, I, 5, II, 16. (4) Brihaspati, Chap. XXV, 67.
(5) Cole. Dig., Vol. II, 573, CCCCXLVII.

acquisition' means 'wealth received in six ways, such as before the sacrificial fire, etc.'

Manu says: "The king shall protect the wealth inherited by an infant till he is married, or till he have passed his infancy."(1) *Commentary*—He should protect the wealth of the infant from being seized by his *sapindas.*

Vishnu says: "The king shall protect the wealth of infants, helpless men, and women."(2)

Sankha and Likhita say: "The king should protect the wealth of infants who are incapable of managing their own affairs and of the widows, of Brahmins and valiant soldiers. But the wealth of which there is no owner goes to the king."(3) *Commentary*—The king must guard the wealth of these women in the absence of their husbands.

Baudhayana speaking of the rights of sons says: "If they are incapable of conducting their own affairs, the king should well protect their shares with the accumulations thereon till they attain their age."(4) *Commentary*—'With the accumulation' means 'with the increase.' 'Well protected' means 'carefully guarded.' 'Till' is used in the sense of restriction meaning 'before they have attained or completed in their seventeenth year.'

Kātyāyana says: "Let all the co-heirs protect the share of an absent co-parcener; but if he dies leaving an infant son, the whole wealth must be preserved by the kinsmen of that son, and they shall divide it in proper shares after the minor has attained his age."(5) 'Balaputre' means 'having an infant son.' 'Pogandah' means 'infant incapable of managing his affairs.'

Vishnu says: "He who also takes a share should give the pinda."(6)

A Smriti says: "He who takes the wealth should perform the *sraddha* to the owner of the wealth and should give the pinda to three ancestors."(7) *Commentary*—The word 'sraddha' here

(1) Manu, Chap. VIII, 27.
(2) Vishnu, Chap. III, 65.
(3) Cole. Dig., Vol. II, 575, CCCCLI.
(4) Cole. Dig., Vol. II, 575, CCCCLII.
(5) II Cole. Dig.
(6) Vishnu, Chap. XV, 40.
(7)

denotes the *proshita shraddha* and the *ekoddhishta*, etc. So says Prakāsakāra.

Brihaspati says: "The brother or the brother's son or the *sapinda* or the pupil having performed the *sapindaikarana* shall obtain prosperity."(1)

Vasishtha says: "The son even though he receives no patrimony shall offer the pinda."(2)

Vishnu says: "The preceptor or the pupil shall take the wealth of an ascetic."(3)

Yājnavalkya says: "The heirs of an ascetic and a *sanyasin* and of a *brahmachárin* are in order the preceptor, the virtuous pupil and the fellow-student and brother in virtue."(4) *Commentary*—'In order' means 'in the inverse órder.' Thus the preceptor shall také the wealth of a *brahmachárin*; the virtuous pupil, the wealth of a *sanyasin*. 'Virtuous,' *i.e.*, skilled in hearing, remembering and practising the truths of the Vedanta Sastra. The fellow-student and brother in virtue takes the wealth of an ascetic. 'Brother in virtue' means 'associated with him as brother in the performance of religious duties.' 'Fellow-student,' *i.e.*, a pupil of the same preceptor and belonging to the same order. Although this rule conflicts with the text of Vasishtha which says that men in other orders take no shares, it must still be reconciled on the supposition that the ascetic may sometimes come by property.

Here ends the chapter on the inheritance to the wealth of the sonless deceased.

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Ranga Ayyar *v.* Srinivasa Ayyangar, I. L. R., 21 M., 56. This decision is a remarkable instance of a new tendency which has developed in the Madras High Court for the last few years to decide second appeals finally, even where according to law, it would be necessary to have a finding of the lower appellate Court upon a question of fact. To call for a finding from the lower Court for the decision of a question necessarily involves delay in the disposal of the case. But

(1) Brihaspati, Chap. XXV, 101. (2) Found in Vishnu, XV, 43.
(3) Vishnu, Chap. XVII, 15 and 16. (4) Yajnavalkya, Chap. II, 136.

it is difficult to see how the inevitable delay can be an argument in favor of the High Court assuming power which it did not possess. In the case under notice, the defendant had conveyed the property to the plaintiff's predecessor and pleaded that it was a sham sale executed *benami.* The District Judge on appeal upheld this contention for several reasons. The property had remained in the possession of the alleged vendor, the patta was not transferred, and the sale-deed remained in the vendor's possession. These were undoubtedly circumstances which the Judge was entitled to consider in determining whether the sale was benami or not. On second appeal, the High Court reversed this finding. The question was purely one of fact and the High Court, as practitioners are often told where there is no disposition to interfere, had no power to pronounce upon it in second appeal. Assuming that the Judge had overlooked that the onus lay heavily on the defendant alleging that it was a benami sale to prove it, the only course open to the High Court was to draw the attention of the lower appellate Court to that fact and to ask for a fresh finding. But here the High Court set it aside and gave a decree for the plaintiff. The ways of the Madras High Court are really peculiar.

Muthappudayan *v.* **Ammani Ammal,** I. L. R., 21 M., 58. The question in this case relates to the rule of succession to the *stridhana* of a woman given to her after marriage. The Mitakshara rule is that the daughters succeed in preference to sons. But the Smritichandrika makes her an heir jointly with the son. The learned Judges followed the authority of the Mitakshara as it was supported by Smriti texts and the Saraswati Vilasa. The decision appears to us to be correct, and we welcome it as upholding the rights of women.

Subramania Ayyar *v.* **Saminatha Ayyar,** I. L. R., 21 M., 69. The question in this case was an interesting one. In the case of an exchange, express covenant to indemnify in a certain manner in case of loss by defective title excluded the implied covenant in S. 119 of the Transfer of Property Act that the parties should be restored to their original position. The learned judgment of the Court places the matter upon a clear footing. The argument that the express covenant was only supplementary to the covenants implied did not find favour with their Lordships.

Nabbu Khan *v.* **Sita,** I. L. R., 20 A., 2. The Code of Civil Procedure takes no notice of lunatics not adjudged under the Act, and no procedure is laid down in the case of such persons. It is difficult to treat them as normal persons, because they are not adjudged; for hardship

and injustice will result if suits are to be prosecuted or defended by them. It is pointed out in *Tukaram Anant Joshi* v. *Vithal Joshi*, I. L. R., 13 B., 656, that the provisions of the Code are not exhaustive, and that they should be represented by a next friend or a guardian *ad litem*, as the case may be. The Allahabad High Court has rightly followed this decision.

Puran Mal *v.* **Kr&nt Singh**, I. L. R., 20 A., 8, S. 544 of the Civil Procedure Code has been often misunderstood, and the Allahabad High Court has done well to draw attention to the conditions necessary for the application of that section. The lower Court should have proceeded upon a ground common to the defendants, and the appellant should appeal against the whole decree so as to include the interests of the other defendants as well. It is only then that the appellate Court has the power to interfere even on behalf of defendants not appealing.

Amjad Ali *v.* **Muhammad Israil**, I. L. R., 20 A., 11. The Court Fees Act is becoming a regular snare to persons instituting suits or preferring appeals. It is an old unintelligible enactment, and there are numerous difficulties in construing its provisions in determining the proper fee for a plaint or memorandum of appeal. The Court Fees Act says that a plaint and memorandum of appeal insufficiently stamped is of no validity whatever. The provision was practically treated as one having no reference to limitation until the Allahabad High Court made the discovery twenty years after it became law. The Legislature tried to correct the Allahabad view by a blundering piece of legislation contained in S. 582-A, whereby, except where the insufficiency arose from mistake, an appeal upon an insufficient stamp was set to be not properly presented for purposes of limitation. The special provision thus enacted in the case of appeals suggests by implication that mistake is no ground of excuse in the case of a plaint insufficiently stamped. Instead of construing all these fiscal enacments strictly and in favor of the subject, some of the Judges of the Madras High Court are discovering methods for the disposal of suits and appeals by holding them not properly presented. We cannot understand what possible object the Legislature can have in enacting fiscal provisions except to raise some revenue for the administration of justice and to keep down vexatious litigation. It could never have been in any body's mind that people should be misled by paying a smaller fee in order that the moment the period of limitation has expired they might be told that there was no plaint before the Court. As well might the Legislature take away the right of action or of appeal.

Thika Ram *v.* **Sama Charan**, I. L. R., 20 A. 42. The learned Judges who decided this case appear to us to have gone wrong in supposing that the Privy Council in *Mussummat Lachhan Kunwar* v. *Anant Singh*, 22 I. A., 25, has overruled the decision in *Ram Kali* v. *Kedar Nath*, 14 A., 156. After the Limitation Act of 1871 came into force, even though possession by a stranger was adverse to a Hindu widow, the reversioner could sue within 12 years from the date of the widow's death for the recovery of the property. Act XV of 1877 lays down the same rule. A different rule has of course prevailed under the Limitation Act of 1859, according to which time ran against the reversioner during the life-time of the widow, or from her death, according as the possession of a stranger was adverse to the widow, or derived from her. What the Privy Council in 22 I. A. had to decide was that the rule of *res judicata* by representation applied where a decision adverse to the life-owner had been passed in a prior suit. Where no such suit has been instituted, the language of the Law of Limitation is perfectly clear that time runs only from the date of the death of the life-owner. This view has been accepted and followed by the Calcutta High Court in numerous cases and also by the Madras High Court.

SUMMARY OF RECENT CASES.

Limitation Act (XV of 1877, sch. II, Ss. 36, 39, 48, 49, 109— Crops when cut—Specific movable property.

Mungun Jha *v.* **Dulhin Golab Koer.**

Held—By the Full Bench (*Rampini, J.*, dissenting) that a suit for damages for cutting and carrying away crops does not fall withing the terms of Art. 36, sch. II.

Per Maclean, C. J. (*Trevelyan, J.*, assenting):—that if the case does not come within Art. 39, it falls within Art. 49, as the crops having been severed from the soil it became specific movable property, and the fact that the severance was a wrongful act of the tort-feasor made no difference.

Per Macpherson, J.—That the case comes within Art. 49 or Art 48, as crops after being cut are specific movable property, possibly also under Art. 109, if it is not brought under Art. 39.

Per Ghose, J.—That Art. 49 applies to the case.

Sarat Lal Mundal v. *Umar Haji* (1) followed; *Pandah Gazi* v. *Jenuddi* (2), distinguished by *Macpherson* and *Ghose*, JJ., and dissented from by *Trevelyan*, J.:—2 *Calcutta Weekly Notes*, 365.

Promissory note, endorsement of—Negotiable Instruments Act (Act XXVI of 1881), *S.* 8*—Benamidar.*

Sarat Chunder Dutt *v.* Kedar Nath Dass.

An endorsement legally made of a promissory note forwarded by delivery of it to the endorsee makes him the "holder" of it within the meaning of S. 8 of the Negotiable Instruments Act, and he can sue upon the note, although he may be a *benamidar* of the real owner of the note ;—2 *Calcutta Weekly Notes*, 286

Act IV of 1882 *(Transfer of Property Act), S.* 135*—Actionable claim—Person claiming the benefit of S* 135 *not obliged to pay the amount paid by the assignee before judgment.*

Phul Chand *v.* Chhote Lal.

Held that a person who is entitled to claim the benefit of S. 135 of the Transfer of Property Act of 1882 does not lose the benefit of that section if he puts the assignee to proof of the price paid by him and waits until the amount of the price has been determined and declared by the Court. There is nothing in the section to preclude the debtor from securing his discharge by payment of the decree. *Rani* v. *Ajudhia Prasad* (I. L. R., 16 A. 315); *Muchiram Barik* v. *Ishan Chunder Chuckerbutti* (I. L. R., 21 C. 568); *Jani Begam* v. *Jahangir Khan* (I. L. R., 9 A. 476); *Hakim-un-nissa* v. *Deonarain* (I. L. R., 13 A. 103); and *Nilakanta* v. *Krishnasami* (I. L. R., 13 M. 225) :—*The Allahabad Weekly Notes for* 1898, *p.* 54.

Act IV of 1882 *(Transfer of Property Act), S.* 85*—Civil Procedure Code, S.* 43*—Cause of action—Mortgage—Holder of two mortgages on the same property suing separately on each.*

Sundar Singh *v.* Bholu.

There is nothing to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant to either of them, from obtaining a decree for sale on each of them in a separate suit :—*The Allahabad Weekly Notes for* 1898, *p.* 58.

Hindu law—Joint Hindu family—Rights of son in joint ancestral property—Mortgage.

Bhagirathi Misr *v.* Sheobhik.

A member of a joint Hindu family has no power in his father's life-time to make a mortgage of any part of the ancestral family property. *Balgobind Das* v. *Narain Lal* (I. L. R., 15 A. 339) and *Madho Parshad* v. *Mehrban Singh* (I. L. R., 18 C. 157) referred to:—*The Allahabad Weekly Notes for* 1898, *p.* 59.

JOTTINGS AND CUTTINGS.

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The Law of Easements, 2nd Edition:—by R. B. Michell, M.A., Bar.-at-Law, printed and sold at the *Lawrence Asylum Press, Mount Road, Madras.*

The Yearly Abridgment of Reports for 1897:—by Arthur Turnour Murray, B.A., Bar.-at-Law, published by Butterworth and Co., 7 Fleet Street, London, E. C.: Price, *s.* 12/6.

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A pathetic incident relating to Justice Field, who recently retired from the U. S. Supreme Court, was thus reported in the New York Sun: An unwritten law of the Supreme Court transfers to a new member of the body the messenger who has served the justice whose death or retirement made the vacancy he is called upon to fill. When Mr. Justice McKenna was sworn in and took the place vacated by Mr. Justice Field, William Bruce, the colored servitor who had been the aged jurist's faithful attendant for a third of a century and more, informed Justice Field that he was going to serve Justice McKenna in

the future, and would have to say good-by. This was a situation which evidently Justice Field had not contemplated, and the announcement almost overmastered him. In faltering tones he said to Bruce; "Why, William, you aren't going to leave me, are you?" The faithful servant nearly broke down as he told the judge he was compelled to do so, and a pathetic scene ensued. As soon as the venerable jurist could collect himself, he exclaimed; "If I had known that you would not stay with me now I wouldn't have retired":—*The Albany Law Journal.*

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The following *Legal Laughs* are taken from the *Albany Law Journal.*

A certain eminent judge who was recently re-elected, when he was asked about the facility with which he turned from one case to another, answered that he had learned that from what he saw at a baptism of colored people when he was a boy. The weather was very cold, so that to immerse the candidates they were obliged to break away the ice.

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A plaintiff kept interrupting the defendant. Judge Bacon—"Be quiet!" Plaintiff—"But I can't keep still and listen to such lies." Judge Bacon—"Try and imitate me. I have to."

***

Southern Justice—"Bill, I find yo' guilty of shootin' th' nigger an fine yo' one dollah—that is, ef yo' kin spare it."

Prisoner (indignantly)—"One dollah, Si Jenkins! Do yo' mean to say yo' are goin' to fine me one dollah foh on'y shootin' a nigger?"

Southern Justice (apologetically)—'Yais, Bill. I know it's a trifle stiff, but this cote needs the money, an' I'll take it off next time, too."—Judge.

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A Lawyer and his Client;—Of course, Webster was in demand by those who could afford to pay for his services, says the Boston Herald. A sharp Nantucket man is said to have got the better of the great defender of the constitution in an amusing way, however. He had a small case which was to be tried at Nantucket one week in June, and he posted to Webster's office in great haste. It was a contest with a neighbour over a matter of considerable local interest, and his pride as a litigant was at stake. He told Webster the particulars, and asked what he would charge to conduct the case. "Why," said Webster,

"you can't afford to hire me. I should have to stay down there the whole week, and my fee would be more than the whole case is worth. I couldn't go down there for less than $ 1,000. I could try every case on the docket as well as one, and it wouldn't cost any more, for one case would take my time for the entire week, anyway." "All right, Mr. Webster," quickly responded the Nantucketer. "Here's your $ 1,000. You come down, and I'll fix it so you can try every case." Webster was so amused over this proposition that he kept his word. He spent the entire week in Nantucket, and appeared on one side or the other in every case that came up for hearing. The shrewd Nantucketer hired Daniel out to all his friends who were in litigation, and received in return about $ 1,500, so that he got Webster's services for nothing and made a good profit to boot. If that man were alive in these days of trusts and syndicates, he would probably be at the head of a legal trust controlling the services of all the big lawyers of the country.

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Dogs as witnesses :—In the recent case of *Walter Pedigo* v. *Commonwealth of Kentucky* decided by the Court of Appeals of that State, last week, the very interesting question of the value of dogs as witnesses was passed upon. It was in the somewhat celebrated "blood-hound witness case," as it is commonly known. The following is the dissenting opinion of Judge Guffy:

I concur in the reversal of the judgment in this case, but dissent from so much of the majority opinion as holds that the trailing or proven trailing of the defendant by a blood hound can be introduced as evidence upon the trial of such person charged with any crime. It is true that the majority opinion so restricts such proof and requires so many conditions precedent that, if the opinion in question should be strictly adhered to, no great injustice would very often result from evidence admitted under the ruling in question.

It, however, seems to me, with due respect to the majority opinion that such a rule of evidence is contrary to all other rules of evidence, and if not in violation of the letter of the constitution, is manifestly in violation of the spirit as heretofore expounded by this court. Such a rule seems to me an innovation upon all the heretofore established rules of testimony. The use of blood hounds was, perhaps, necessary to efficiently and effectually uphold the institution of slavery, as well as to aid in the arrest and capture of persons accused of crime in the dark ages. In such cases, however, the object sought was the arrest or capture of known fugitives. If the dog in fact took up and followed

the trial of a fugitive, and found him, or aided his pursuers to find him, the object was accomplished, and there could be no mistake as to whether he was the party sought or not. His guilt and right of capture having been theretofore established, and, in fact, being unquestioned. If the hound took the wrong trail and brought to bay the wrong party, that fact would be ascertained so soon as the pursuers reached the party, and the utility of the hound in that regard then ceased. It is now proposed to use the hound, not to capture a fugitive, but to ascertain or furnish evidence to convict some citizen of crime. It seems to me that this new use of the blood hound is a radical departure from the former purposes for which they were used; but whether this be so or not, it seems to me that neither the life nor liberty of a citizen should be taken away, or even jeopardized, by the mere fact that some person testified that the hound was well trained to track human beings, etc., and that he had trailed the accused from the scene of the crime to the habitation of the accused, or until he came upon the accused party. There is danger that the effect of the majority opinion will likely be to greatly promote the raising and training of blood hounds, or hounds that will be called blood hounds. It is a well-known fact that the owners of hounds, as well as other property, usually hold such property in high esteem; and as the owner or trainer of hounds will be engaged in the business for pay, it will be greatly to their interest to always have well-trained hounds. In fact, I presume there will be none but trained and expert hounds in a few years, at least such will be the opinion of their owners, for it would be uttterly useless to have any other sort.

It is common tradition, and doubtless believed by quite a large number of persons, that blood hounds are capable of wonderful feats of trailing. In fact, the many wonderful stories told of the achievements of blood hounds (mostly in the imagination of those originating them) have instilled into the minds of quite a number of persons such wonderful notions of the unerring, if not infallible, knowledge and intelligence of the hounds that the fact that the *hound said* that a certain person had lately been at the place where the crime was committed would be the most conclusive proof that could be produced.

If it should even be conceded that every owner and trainer of hounds would be perfectly fair and impartial in endeavoring to strike the trial only of the party who had been at the scene of the crime, and likewise impartial in his testimony as to the expertness of the dog; yet such evidence is entirely too vague and uncertain to be allowed to jeopardize the liberty of a freeman. It seems from common history, as

well as the proof in this case, that the blood hound is supposed to be capable of taking up and following the trail of a human being that has been made from 24 to 40 hours. If that be true, and it is unreasonable, then it must necessarily follow that the hound aforesaid could take up the scent of a man who had passed within a quarter of a mile of the place a few hours before the hound was taken to the place to find the scent. I think this conclusion necessarily follows. Take, for example, the case at bar. It seems that the barn was located in an open field, and the prosecution would have us believe that many hours thereafter the hound was able to take the trail and follow it. It is reasonably certain that a man wearing shoes would leave less scent on the ground to remain for 12 or 15 hours than he would leave if going through timber. It, therefore, follows, as I think, that if a hound was taken to the scene of the crime, or supposed crime, and any person had passed, shortly before the arrival of the dog, within a quarter of a mile of the place, especially if his route lay through timber, the dog finding no scent at the point where he was taken to search for same, and knowing, if he knew anything, that he was desired to trail some human being, he would naturally go to the place and in the direction of the scent, or, in other words, would find the trail by reason of his acute scent of some person who had passed sufficiently near the place to enable the hound to take up the scent. It would be impossible to demonstrate whether or not he found the actual trail at the spot to which he was taken, or whether, as all dogs will do when it is sought to put them on a trail, he commenced hunting for one, and so continued until a trail was found in that vicinity.

It may also be assumed as certain that the hound would take up the first trail or follow the first trail that reached or affected his olfactory nerves after it was made known to him that he was there for the purpose of trailing somebody. I do not think it is possible to establish the fact that the hound will not quit the first trail that he may take up and go off with another which he might happen to fall in with or cross. Doubtless his keeper would often be of the opinion that the hound would never take up a trail other than the one he first took.

I do not think that the evidence as to what the *hound said* or indicated should ever be admitted as testimony for the further reason that there is too much danger of an innocent person being convicted, or at least arrested and permanently disgraced by the admission of such testimony. This case illustrates the danger alluded to. From the evidence in this case it is highly probable that quite a number of persons went that very night to the dormitory, or to the house opposite the

dormitory, and if they happened to pass by or near the barn the dog of necessity was as apt to take one trail as another, and hence there would be no sort of certainty in his trailing the criminal if any there was. To illustrate further, it is learned from common rumor and from the press that a great many toll-gates have been lately destroyed, and it seems very difficult to ascertain who are the guilty parties. The gates are on the public highway, where persons pass, and have the right to pass and re-pass, yet if a blood hound should be taken to the scene of the crime within a reasonable time thereafter for the purpose of trailing the guilty party, he would be almost certain to find some trail, and trail some person to his home, and after having been sufficently shown to be an expert, etc., his testimony would be admitted to fix the guilt upon some party perhaps entirely innocent, and who, in the exercise of his right, had passed that way. The same may be said as to a large number of crimes supposed to have been clandestinely committed, or, in fact, have been committed. Many houses and barns are burned down. Some fires are of incendiary origin, while a number are the result of accidents or carelessness, yet, under the majority opinion in this case, it would seem that, if an expert hound trailed a party from the scene of the burning to his home, or place where he was known to have been shortly after the fire, that fact might be proven in evidence against him, although, in fact, he might not have been there at all, or if he had been, had simply been a casual passerby. Such evidence should not be admitted for the reason that the defendant is not permitted to cross-examine the witness, who in reality is the dog, whether he is the legal witness or not. I am aware that it has been held that you could prove dying declarations against the defendant, and it has been said that he has the consitutional privilege of meeting the witness face to face, because the party testifying is the one who is reciting the dying declarations, but the admission of the *statement* or trailing by the hound is not a parallel case. The trailing of the hound, if evidence at all, must be upon the supposition that he took the track at the scene of the crime and followed it, but the defendant has no chance to inquire of the hound how far from the place did he really find the trail, or did he cross any other or find any others. If a person was testifying to having tracked the defendant from or about the place, he could be cross-examined upon that subject to know whether there was any other track, and which appeared to be the freshest, and size, and whether the trail he was following crossed or fell in with other trails. Not so with the dog. He has had his say and left. There is another familiar rule of law, that A, a witness, will not be allowed to testify that B told him that he saw the defendant at the place, or that he

trailed him or saw him going from the scene of the crime; but it seems to be contended in this case that A may tell what the *dog said about it.* A person may be murdered in a highway or road that is rightfully traveled by numerous persons. 25 or 50 persons may have passed within less than a dozen hours, and upon the discovery of the crime a blood hound may be brought there, and if he has any of the attributes which he is generally credited with, he will certainly find some trail and land somewhere would it be right to allow that fact to be proven against the party accused of the murder? If such evidence be admitted, it seems to me that a man might, in fact, be hanged without any other evidence than the mere fact that the blood hound was proven to have taken up the trail at the scene of the murder and followed it to the house of the defendant. Such evidence must tend to establish his guilt, else it could not be admitted, and if the jury upon such evidence found him guilty, how could this court reverse? It will not do to say that the jury will not convict a party upon such testimony. As matter of fact and common history, some party is very likely to be suspected of the crime, and after suspicion to a greater or less extent permeates the community, but little additional evidence is required to convict the accused, especially if he be defenseless or destitute of friends and facilities for making a defence.

It seems that if the conditions described in the opinion were complied with, the fact that the hound trailed a person from the scene of the crime would be sufficient to authorize a warrant of arrest, and would be such probable cause as to protect the party procuring the arrest, and thus a citizen might be put to great expense, mortification and disgrace without any evidence at all against him, except the trailing of the hound, and have no redress for any of the wrongs so inflicted. As before intimated, it seems to me that the use of the blood hound properly belonged to the days of slavery and of the bloody criminal code of the dark ages, and inasmuch as the institution of slavery and the code aforesaid have ceased to exist, the hound should be relegated to "innocuous desuetude":—*The Albany Law Journal.*

REVIEWS.

Powell's Principles and Practice of the Law of Evidence, 7th Edition, by Cutler, B.A., and Cagney, B.A., published by *Messrs. Butterworth and Co., 7 Fleet Street, London.* Price, s. 20:—We have great pleasure in recommending the 7th Edition of this

popular book to the profession. The book is as useful as it is handy; and while we are sure it will be largely appreciated by the profession, we think it is likely to be appreciated even better by the law-student, who is in search of a suitable text-book, which within the limits of a manageable size will give him a fairly adequate knowledge of the principles of the Law of Evidence. For the purpose of easy reference the leading principles are stated in the shape of propositions and are printed in bolder type so as to be easily distinguishable from the rest of the text. It is needless to add that the editors have spared no pains to make the book cover all the statutes passed and all the cases reported since the date of the last Edition.

The Law of Easements, by R. B. Michell, M.A., Bar.-at-Law, Chief Judge, Small Cause Court, Madras, *printed and sold at the Lawrence Asylum Press, Mount Road, Madras* :—We have nothing but praise for this edition of Mr. Michell's book on the law of Easements. Speaking of the first edition, we observed "the book has been written on the whole with great care and pains." The second edition deserves even more praise. The book has grown considerably larger in size and a much larger number of cases has been noted up. We do not know whether Mr. Michell's attention was drawn to the criticisms contained in our review, but we adhere to the views there expressed. The matters there dealt with are, however, of minor importance and do not detract from the value of the work which is likely to be highly useful to the student and the profession.

The Yearly Abridgment of Reports for 1897, by A. T. Murray, B.A., Bar.-at-Law, published by *Butterworth & Co.*, 7 *Fleet Street, London*, Price, *s.* 12/6 :—We have received from Butterworth & Co. a copy of the annual digest of the English reports for 1897, together with the principal Irish and Scotch cases reported in that year. The principles are carefully extracted from the decisions, and we have no doubt the book will be highly useful to the profession. Such a publication is of special value in India where the decisions of the English, Scotch and Irish Courts are not easily accessible.

The Madras Law Journal.

PARTS V & VI.] MAY AND JUNE, 1898. [VOL. VIII.

CRIMINAL PROCEDURE CODE, 1898.

The new Criminal Procedure Code, though in form a numerically distinct Act, is in substance the Code of 1882, largely amended. Many of the new provisions are indeed of a controversial character, but we propose, within the limited scope of this article, to deal only with the salient portions of the Code.

Section 21 (1) *e*, & (2). Outside the Presidency Towns certain Magistrates are put under subjection "to the general control of the District Magistrate," *see* S. 17 (2). The expression is quite indefinite, and gives the District Magistrate rather large powers. The present section confers on the Chief Presidency Magistrate the same powers of "general control" over the Presidency Magistrates declared by the Local Government subordinate to the Chief, but such powers are to be exercised only within the area and extent of subordination defined by the Local Government. This section, we submit, does not, as was misapprehended, imply appellate or revisional jurisdiction, but merely disciplinary and advisory powers, and as such seems a salutary enactment as a corrective to the erratic tendencies of some of the honorary and stipendiary solons who preside in Presidency Courts.

Section 107 (2). This section creates an extension of the present jurisdiction of Presidency and District Magistrates, and entails a curtailment of that of Sub-divisional and First Class Magistrates, and according to S. 107, of the present Code, Presidency and District Magistrates can call upon persons only resident within the limits of their jurisdiction to furnish security, but possess no power over persons resident outside the same, though the contemplated breach of the peace may be within their limits of jurisdiction (*Re Jai Prakash Lal*, I. L. R., 6 A., 26; *Re*

Rajendro Chunder Roy, *Ib.* 11 C., 737; *Re Dinonath Mullick*, *Ib.* 12 C., 133; *Re Abdul Aziz*, *Ib.* 11 A., 49). Under the new Code such Magistrates will have jurisdiction even in the case of persons resident beyond. So that a man resident in Busar may be called upon to show cause in Calcutta, if the Court thinks a breach of the peace likely here. This section will afford considerable scope for the harassment and annoyance of persons living at a distance, and is, therefore, extremely dangerous in character. However, as a compensation, the new section gives Sub-divisional and First Class Magistrates power only when the person and the place of contemplated breach of the peace are both within their jurisdiction. When a person is within, but the place is without, the jurisdiction, such Magistrates have no power to act, but must send up the case under clause (3) to the District Magistrate.

Section 108. This section is of a far-reaching character, and may, we are afraid, be employed as an engine of oppression in the hands of the mofussil magistracy. What might be construed to be an "*attempt to disseminate*" may well cause us alarm and apprehension. It involves also the construction of sections (124-A and 153-A) by *magistrates* which have much exercised the minds of *High Court Judges* with their superior legal training. Clause (c) will prevent mofussil papers from bringing to light cases of local, judicial and executive vagaries. In many cases the very officer aimed at, or his superior or subordinate, may at the same time be the presiding Magistrate. The accused cannot object to the Magistrate under S. 556, which is limited to "inquiries" and "trials," and not to proceedings under Chap. VIII. He may possibly apply under S. 526 for a transfer of the case, though it is not quite clear; whether for the purposes of the section, he can be termed an "accused," or whether proceedings under Chap. VIII come within the definition of "criminal case.' It may well be, the courts would construe the latter phrase to mean the "inquiry or trial" alluded to in clause (a), and in this case, the remedy under S. 526 would be closed to him. The safeguard provided for in S. 108, para. 2, applies only to editors and printers, and would not protect others from proceedings under the section without such sanction. An appeal from an order under Ss. 108 and 118 lies to the District Magistrate (*see* S. 406), and the unfortunate person fares no better. S. 108 is out of place in chapter VIII which

deals with the *prevention* of offences not yet accomplished. S. 108 implies the actual commission of offences under Ss. 124-A, 153-A, 499 and 503, in respect of which proceedings under the Penal Code may be taken. The section, instead of preventing the commission of an offence, provides a new and milder punishment for these offences concurrently with the penalties in the Penal Code.

Section 162* A point of the greatest moment to the accused is involved in this section. Under the Act of 1882, S. 162, it has been held by the Calcutta High Court that the accused has the right of inspection of statements recorded under S. 162, even if entered in the diary under S. 172 (*Mahomed Ali Hadji* v. *Queen-Empress*, I. L. R., 16 C., 612; *Bikao Khan* v. *Queen-Empress, Ib.* 610; *Sheru Sha* v. *Queen-Empress, Ib.* 20 C., 642), if he calls for them in proper time. The right of the accused to a copy of such statements has not been expressly mentioned in these rulings, but such right is incedental to the right of inspection. Under S. 94 of the Criminal Procedure Code and S. 165 of the Evidence Act, the Court can always call for any documents at its discretion. The new section makes it compulsory on the part of the court to call for and inspect the written statement itself; so far it is open to no objection, but it leaves it to the court's discretion to allow copy of the statements to the accused. It is not clear whether the section prohibits the accused only from obtaining a copy, or even from inspection, except with the permission of the court. If it implies right of inspection, but denial of a copy unless allowed by the Court, the accused is not seriously hampered in his defence: if, however, the section prevents the right of inspection by the accused altogether, and makes the obtaining of a copy discretionary with the court, the new section places the accused in a worse position than he is at present under the Calcutta rulings. We submit that the court ought to exercise its discretion judicially in the matter of giving copies, and that whenever there are *material* discrepancies between the statements and the evidence in court, it ought to allow the accused a copy. The Court in refusing a copy is bound to state in its order sufficient materials to enable the High Court in revision to decide whether the discretion has been judicially exercised (*In the matter of the petition of Panjab Singh see* I. L. R., 6 C., 579);

* See the Article "Police Diaries" by the writer, in the first volume of the *Calcutta Weekly Notes*, p. cclxxvii.

and we are confident that the High Courts will see that no injustice has been done to the accused in this matter.

Section 191. If a Magistrate takes cognizance of an offence under S. 190 (c), and the accused objects to being tried by him, the Court may commit the accused to the Sessions. This is startling. As the section is worded, there is no indication as to what classes of cases is to be committed, nor is any procedure mentioned. But it could not have been intended to leave these matters to the discretion of the Court, and we think the provisions of Chapter XVIII must be taken to apply, and that the committal must be in accordance therewith. This section makes a committal compulsory and does not allow the Magistrate power to discharge the accused under sections 209, 213: whereas if the case were transferred to another Magistrate, the accused could legally be discharged.

Section 202. The alterations in the new section imply a shade of doubt less than distrust. The section is, however, practically the same as the existing one. Magistrates have no time on the Bench to enter into philosophical examinations of their states of mind so as to decide whether they are not *satisfied as to the truth* of a complaint, or whether they *distrust the truth* of it. It would have been better in such cases, instead of calling for a police inquiry, which is largely influenced by pecuniary considerations offered by one or both parties, to have allowed the issue of a notice on the accused to show cause why process should not issue—a procedure often adopted in practice, though its legality is doubtful.

Section 208 (2). This clause has been added owing to the difficulties expressed in the argument in *Queen-Empress* v. *Sagal*, I. L. R., 21 C., 642.

Section 213 (2). This is an important and salutary addition to the Code. The charge may be cancelled if the fresh evidence shows it to be erroneous or unsustainable.

Sections 252, 254, 256, 257. The procedure in warrant cases is much altered by these sections. Sections 252 and 254 must be read together to avoid inconsistency, and enact that the Magistrate is not bound to examine all the prosecution witnesses before framing a charge (as he must under the Code of 1882), but only as many as he thinks sufficient to prove a *primâ facie* case for the

purpose of drawing up a charge. The remaining prosecution witnesses are to be examined after the charge as laid down in the new section 256. This is a very important alteration of the existing law. Another material variation from the Code of 1882, though whether it was actually contemplated is doubtful, is that the accused may have *three* cross-examinations; one under S. 252, according to the case of *Queen-Empress* v. *Sagal*, I. L. R., 21 C., 642; another under S. 256; and a third under S. 257, provided, of course, in the last case, the Magistrate considers that the application for process against the prosecution witnesses is not for the purpose of vexation or delay or for defeating the ends of justice, and provided further that the Magistrate "is satisfied that it is necessary for the purposes of justice." It is possible to conceive of cases where the third cross-examination under S. 257 would be conducive of justice, especially in the case of the prosecution witnesses examined under S. 256 after the charge, but in many cases such cross-examination will be productive of no substantial benefit to the accused, and the Court should see that the section is not abused.

Section 292. Under Act X of 1882 the right of reply depends on the statement of the accused that he "means to adduce evidence," and hence, if he states he does not mean to do so, then, notwithstanding the fact of the defence counsel having tendered in evidence during cross-examination certain documents, the prosecutor has no reply (*Queen-Empress* v. *Grees Chunder Banerjee*, I. L. R., 10 C., 1024, *see* also *Empress of Indian* v. *Kaliprosonno Doss*, I. L. R., 14 C., 245, *Queen-Empress* v. *Solomon*, *Ib.*, 17 C., 930, and *Queen-Empress* v. *Krishnaji*, I. L. R., 14 B., 436: *see contra*, *Queen-Empress* v. *Venkatapathi*, *Ib.*, 11 M., 339; *Queen-Empress* v. *Hayfield*, *Ib.*, 14 A., 212). The new section gives a right of reply if the accused has in fact "adduced any evidence." This seems to follow the rule in the Madras and Allahabad cases and to over-rule the Calcutta and Bombay decisions.

Section 406. It is much to be regretted that, at least in the case of orders passed under Ss. 108 and 118, the appeal has not been directed to lie to the High Court instead of the District Magistrate. Where the order has been passed by the District Magistrate himself, it is final.

Section 435 (4). This avoids the unseemly spectacle of one officer exercising jurisdiction when the other has refused to do so.

Section 437. As one of the main objects of the recasting of the Code was to elucidate doubtful matters it might have been expected that certain points in connection with the section should have been expressly mentioned. The question of notice to the accused is passed over. The rulings in *Chunder Churn* v. *Hem Chunder*, I. L. R., 10 C., 207; *Nobin Kristo* v. *Russick Lall, Ib.*, 268; *Darsun Lall* v. *Jumuk Lall, Ib.*, 12 C., 522; *Hari Doss Sanyal* v. *Saritulla, Ib.*, 15 C., 608; *Queen-Empress* v. *Maniruddin Mundul, Ib.*, 18 C., 75; *Queen-Empress* v. *Errcmreddi, Ib.*, 8 M., 296; *Queen-Empress* v. *Amir Khan, Ib.*, 336; *Queen-Empress* v. *Hasnu, Ib.*, 6 A., 367; *Queen-Empress* v. *Choru, Ib.*, 9 A., 52; and *Queen-Empress* v. *Dorabji Hormasji, Ib.* 10 B., 131, may, however, be taken as still conclusive of the point. The question whether an order under the section could be passed upon the same or further materials is also not answered, and hence the decisions in *Hari Doss Sanyal* v. *Saritulla, Ib.*, 15 C., 608; I. L. R., 10 B., 131; I. L. R., 9 A., 52, and *Queen-Empress* v. *Balasinnadambi*, 14 M., 534, must be looked to for the solution. The exact scope of the words "into the case of any accused person who has been discharged" is not understood apparently by the lower revisional courts, and has led to rulings laying down that they have no power to order further inquiry in cases of orders passed under S. 133. *Srinath Roy* v. *Ainaddi Halder, Ib.*, 24 C., 395, or under S. 145, *Chathu Rai* v. *Niranjan Rai, Ib.*, 20 C., 729. Owing to the meaning of the word "accused" given in *Queen-Empress* v. *Mora Puna*, I. L. R., 16 B., 661, and followed in I. L. R., 23 C., 493, it may appear that orders under Ss. 188, 488 can be revised under S. 437, but such is not the intent of the above expression. It would have been far better if the words "under Ss. 209, 213, 253" had been added after the word "discharged."

Section 439 (5). This clause only bars the accused from applying to the High Court *before* and not *after* the appeal. It was strongly objected to at the time the Bill was discussed, but it is in reality another form of the rule laid down in *Queen-Empress* v. *Reolah*, I. L. R., 14 C., 887, and *Queen-Empress* v. *Chagan*, I. L. R., 14 B., 331.

Section 503 (1). The doubt expressed in *Hem Coomaree Dossee* v. *Queen-Empress*, I. L. R., 24 C., 551, whether Presidency Magis-

trates have power to issue commissions in respect of witnesses resident within their jurisdiction is still left open.

Section 517 *and explanation.*—S. 517 sets at rest to a certain extent the vexed question as to the power of the Court to deal with property before it when the accused is discharged or acquitted—See *Queen-Empress* v. *Fattah Chand,* I. L. R., 24 C., 499; *Re Mate Ghosh,* 1 C., W. N. 561—but the explanation limits the definition of "property" therein contained to property regarding which an offence appears to have been committed. So that if an accused has been discharged or acquitted, and the property before the Court has been converted into or exchanged for other property, the Court will be in the same difficulty as before. S. 517 read with the explanation will only empower the Court to deal, on discharge or acquittal, with property which remains in its original state. It may be that by an oversight the wording of the explanation was not altered to correspond with the alteration in the section.

Section 526 (8). It is a matter of great satisfaction that the clause remains as it stands in the present Code, without the objectionable restriction introduced into the Bill.

Section 533. The word "any" cannot mean "all," and the section, even as it stands, will not render a confession admissible where no attempt has been made to conform to Ss. 164, 364 (*Queen-Empress* v. *Viran,* I. L. R., 9 M., 224). It was intended by the change of language to bring within the scope of the section the case where a confession is not recorded in the language in which it was made, though it was practicable for the Magistrate to have done so. The point has not yet been finally decided by any High Court. The cases of *Queen-Empress* v. *Nilmadhub Mitter,* I. L. R., 15 C., 595; *Jai Narayan* v. *Queen-Empress,* I. L. R., 17 C., 862, are one way, while *Lalchand* v. *Queen-Empress,* I. L. R., 18 C., 549, is the other way; and *Queen-Empress* v. *Sagal,* I. L. R., 21 C., 642, is indecisive. Whether the result aimed at by the alteration of the section has been achieved is another matter. The words "duly made" are still retained, and it may be argued, as in I. L. R., 17 C., 862, that they show that the defects aimed at in S. 533 refer only to signatures and certificates.

Section 537, *Explanation.* The explanation is a grave restriction upon the power of the High Court. If the irregularity could have been objected to in the earlier stages of the case, then the Court is not to interfere, notwithstanding a clear failure of justice. As objection may always be taken to the irregularities mentioned in the section during the progress of the case in the Court below, except perhaps where there is an irregularity in the judgment itself, or misdirection to the jury, the explanation would shut out the majority of cases that would otherwise fall within the section. The explanation will, no doubt, be strictly construed in favor of the accused. Where an accused is undefended or not represented by a skilled pleader, it would be extremely unjust to hold that the finding cannot be reversed, because objection could legally have been taken at an earlier stage.

Section 540. It will be noticed that Chapters XX and XXI are silent as to the *right* of the prosecution to interpose witnesses or offer documentary evidence after the prosecution has closed, in order to explain, or rebut oral or documentary evidence adduced by the defence, or to corroborate a prosecution witness on matters which arose in cross-examination after charge and which could not have been dealt with in the examination-in-chief. Under S. 9 of the Evidence Act, facts explaining or rebutting inference from facts in issue are relevant and the section appears to allow the prosecution the right to tender oral and documentary evidence for the purpose. Under S. 54 the prosecution is entitled to prove bad character after the charge. S. 145 applies to cross-examination and contradiction of defence witnesses, also (*Re Tupsee Koer,* 15 W. R Cr. 23). Under S. 153 certain evidence in contradiction of defence witness is open to the prosecution. The credit of a defence witness is liable to be impeached under S. 155. Then S. 157 would apparently allow corroborative evidence of prosecution witness, with perhaps the limitation in practice that such evidence could not have been given in the examination-in-chief. Though the Evidence Act gives a right to the prosecution to adduce oral and documentary evidence after charge, the Code makes no express provision for this case. Possibly the prosecution could apply for process to compel the appearance of witnesses or the production of documents, but the Court may also certainly be moved under S. 540, Cr. P. C., and S. 135, Evidence Act, to summon witnesses

and under S. 165, Evidence Act, to order production of documents. As to the rulings, it has been held that prosecution witnesses could be called after the defence has begun to contradict a new case set out by the accused—*see Queen* v. *Sham Kishore Holdan*, 13 W. R. 36; *Queen* v. *Chotey Lal*, 3 N. W. P. 271. The Court may record oral and documentary evidence after the charge: *Empress of India* v. *Baldeo Sahai*, I. L. R., 2 A., 253; *Queen* v. *Kassy Singh*, 21 W. R., 61; *In the matter of Ananda Chunder Singh* v. *Basu Mudh*, I. L. R., 24 C., 167. It is the duty of the Court to call material prosecution witnesses even after the case is closed—23 W. R. 67. The rule in civil cases is the subject of decision in *Kazi Gulam* v. *Aga Khan*, 6 B. H. C. R., O. C. 93, and *Khadijah* v. *Abdool Kurreem*, I. L. R., 17 C., 344.

Section 562 is a tardy recognition of a principle well established in England. It is one of the wisest features of the new Code; but being a provision hitherto entirely unknown to Indian law may not be properly understood at first by the lower ranks of the magistracy.

Section 565 will give the police an excellent opportunity for levying blackmail from an unfortunate released convict. The rules to be framed under clause 3 will, we hope, be founded on a consideration of this fact.

Schedule II, 124-*A*. Offences under S. 124-A will be triable by Presidency Magistrates, District Magistrates, and even specially empowered First Class Magistrates. This provision, it is true, has the advantage of avoiding giving petty editors an undeserved notoriety, but it also removes what would otherwise have acted as a practical check upon the Government in instituting proceedings unless it had a good case. The safeguard arising from trial by Jury no longer exists. An editor may now be quietly arrested, put up before a First Class Magistrate, and laid by the heels without any fuss or bother, and sent to rusticate for a few months in one of Her Majesty's jails.

E. H. MONNIER.

HINDU LAW—SUCCESSION UNDER THE MITAKSHARA TO WOMAN'S PROPERTY INHERITED FROM A FEMALE.

There is, perhaps, in the Hindu Law no subject which is involved in greater obscurity or beset with greater difficulties than the law relating to the devolution of *stridhanam*. It has now become settled law, that property inherited by a woman from a male owner does not class as her *stridhanam* and is not transmissible to her heirs. Her succession itself is regarded as a case of interposition, and after her death the property descends to the heirs of the last male holder. But it is by no means free from doubt, whether a woman's property inherited from a female does not constitute her *stridhanam* or peculiar property and is not transmissible as such in the line of her own heirs. In this article we propose to examine this question and try to indicate what appears to be the law under the Mitakshara.

In *Buchiraju* v. *Venkatappadu*, 2 M. H. C. R., 402, and *Narasayya* v. *Venkayya*, 2 M. L. J., 149, the Madras High Court appears to take the view that property inherited by a woman from a female will constitute the *stridhanam* of the inheriting woman and will pass to her own heirs. But in *Sengamalathammal* v. *Velayuda Mudali*, 3 M. H. C. R., 312, it was distinctly ruled that property to which a woman succeeds as heir of another woman does not become the successor's *stridhanam* or absolute property. This latter view has also been affirmed in two later cases: *Virasangappa* v. *Rudrappa*, I. L. R., 19 M., 110, and *Venkataramakrishna Rau* v. *Bhujanga Rau*, *Ib.* 107. In this state of conflict, it is extremely desirable to examine the question with some minuteness.

Under the Hindu Law, the legal incidents attaching to *stridhanam* property are these. In such property, the woman takes an absolute estate. The second incident of *stridhanam* property is that it devolves according to a special line of descent. The woman becomes a fresh stock of descent and transmits the property to her own heirs.

It is thus seen that the answer to the question now under discussion is really involved in the answer to the question, whether a female takes a qualified or a full estate in the property acquired by inheritance from another female? If the proper view is that

she takes but a qualified heritage, then her succession will amount to a case of interposition between the last full female owner and that owner's heirs; and it will logically follow that the further devolution of the property will be in the line of the full owner's own heirs. If, on the other hand, the proper view is that the inheriting female takes an absolute estate, then she must be deemed to constitute a fresh stock of descent and to be capable of transmitting the property to her own heirs as laid down in the Mitakshara. Indeed the decisions of the courts do all proceed upon this view, namely, that the special rules of descent laid down with respect to woman's peculiar property cannot apply to cases where a woman can be held to have taken only a qualified estate. In short, the two aforesaid legal incidents of *stridhanam* property do always co-exist, so that the one cannot be said to exist in the absence of the other.

The Mitakshara which is the ruling authority in Southern India deals with the laws of succession in Chapter II. In sections I to VII of that Chapter, Vijnanesvara, lays down the rules of succession which are applicable to the property of a male owner and which regulate its devolution after his death. Under the law thus laid down a man's property passes at his death, first to his male issue (*i.e.*, son, grandson and great grandson), and then successively to widow, daughter, daughter's son, mother, father, and so on, each of them taking in default of the previously mentioned heirs. In section XI of that Chapter, Vijnanesvara treats of succession to woman's separate property or *stridhanam* and lays down special lines of descent as regulating the devolution. With respect to a maiden's property, he marks out a special line of descent (*placitum* 30.) As regards all the properties of a married woman excepting her *sulka* (*placitum* 14), he lays down one uniform course of descent (*placitum* 8-13 and 15-25). According to Vijnanesvara, a married woman's property (except *sulka*) will go first to the daughters (*placitum* 2-13), then to the daughter's daughter (*placitum* 157), then to the daughter's son (*placitum* 18), then to the son (*placitum* 19), and then to the grandson (*placitum* 24.) In default of all these, the property will pass either to the husband, and in default of him to his nearest *sapindas* if her marriage was in an approved form or to her mother, father, &c., if her marriage was in an unapproved form (*placitum*) 25; 8-11. It is thus seen that in

the rules of succession relating to a man's property, we find females in the line of heirs; and that in the rules of succession relating to a woman's property, we also find males in the line of heirs.

With respect to property inherited by a male, whether from a male or female, it has never been doubted that the successor takes an absolute heritage. It is only in the case of property inherited by a woman, there is room for doubt and discussion. Does she take an absolute estate, or only a qualified estate in such property? In *placitum* 2 of section XI, the Mitakshara classes as *stridhanam*, not only those properties that are specifically mentioned as such by Manu, Yajnavalkya and others, but also property acquired by a woman by inheritance. *Prima facie* then, this part of the Mitakshara leads to the supposition that a woman takes an absolute estate in the property she inherits (whether from a male or a female) and that the further devolution of such property will be governed by section XI of the Mitakshara and will be in the line of the woman's own heirs as laid down in that section. The course of judicial opinion on the question of the devolution of the inherited property of a woman appears to have been somewhat curious. On the strength of the Mitakshara definition of *stridhanam*, it was at first contended that all the inherited property of a woman (whether from a male or a female) would become her absolute property and would pass in the line of the successor's own heirs. This contention was put forward but overruled by the Privy Council in several cases all relating to property inherited by women from males; and there has been till now no decision of that august tribunal with respect to *stridhanam* inherited from a female. The contention was refuted first with respect to immoveable property inherited by a widow from her husband (*Mussumut Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M. I. A., 139); then with respect to moveable property inherited by a widow (*Bhugwandeen Doobey* v. *Myna Bai*, 11 M. I. A., 487); then with respect to property inherited by a daughter from her father (*Chotai Lall* v. *Chunnoo Lall*, 6 I. A., 15; and also I. L. R., 4 C. 744). In all these cases "it was held that the woman took only a restricted interest and that on her death the property devolved on the line of the last male owner." The above cases were again re-affirmed and

followed by the Privy Council in *Muthu Vaduganatha Tevar* v. *Dorasinga Tevar*, I. L. R., 3 M. 290. And this principle of a limited estate being taken by a woman inheriting to a male owner was naturally extended to the case of all other female heirs, such as mother, sister, &c. It thus became settled law that property inherited by a woman from a male does not class as *stridhanam* proper and does not descend as such. This is the undoubted law at the present day in Southern India and in all other places governed by the Mitakshara except the Bombay Presidency.

But is there any warrant for supposing that the devolution of *stridhanam* inherited from a female is not governed by the special course of descent laid down in section XI of the Mitakshara? The tendency at present seems to be in favor of the other extreme view that no portion of the inherited *stridhanam* of a woman descends as such or is transmissible to her own heirs. The assumption is readily made that because the Privy Council have laid down that section II of the Mitakshara does not apply to property inherited from a male, the section is equally inapplicable to the case of *stridhanam* inherited from a female. The correctness of the assumption will, no doubt, depend upon the answer to the question whether the Privy Council rulings cited above proceed upon grounds applicable equally to all cases of inherited *stridhanam* or only upon grounds peculiar to cases of *stridhanam* property inherited from males only. What then are the grounds upon which these decisions proceed? All that the Privy Council say amounts to this. As Colebrooke's translation covers not the whole but only a portion of the Mitakshara, the other untranslated portions of the Mitakshara may in all probability be presumed to deal with the disabilities of women and to lay down that women take only a restricted estate in the property inherited from males, especially as Manu, Katyayana, Narada and others who lay down those restrictions and who are followed in the Mitakshara upon other subjects are most likely to be followed in this respect also. The argument that the verses in the Mitakshara under which women inherit to males are wholly silent as to the extent of the interest that women take is, therefore, not entitled to much weight; *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M. I. A., at p. 173. Secondly, the argument founded upon the Mitakshara definition of *stridhanam* contained in section

XI, verse 2, has to be considered by reading verse 2 in the light of the other portions of the same section. Their Lordships observe "Another argument against including the wealth inherited from her husband in a woman's *stridhayam* as defined by the 2nd clause of the 11th section of the 2nd chapter of the Mitakshara, may be derived from clauses 11 to 25 (both inclusive) of the same section. These declare the husband to be, in default of the issue, the heir to "*the whole* property as before described." This is intelligible if the words "property which she may have acquired by inheritance" in the 2nd clause are considered to be property inherited in her husband's lifetime, or from some persons other than him," *Bhugwandeen Doobey* v. *Myna Bai*, 11 M. I. A., at pp. 512, 513. Later on they say: "Their Lordships, therefore, have come to the conclusion that according to the Law of the Benares School, notwithstanding the ambiguous passage in the Mitakshara, no part of her husband's estate, whether moveable or immoveable to which a Hindu woman succeeds by inheritance, forms part of her *stridhan* or particular property; and that the text of Katyayana which is general in its terms and of which the authority is undoubted must be taken to determine—first, that her power of disposition over both is limited to certain purposes; and, secondly, that on her death both pass to the next heir of her husband." The text of Katyayana upon which their Lordships chiefly rely is in these terms:—"The childless widow preserving inviolate the bed of her lord and strictly obedient to her spiritual parents may frugally enjoy the estate or property until she die; after her, the legal heirs shall take it." And in support of the conclusion they arrive at upon a consideration of the various texts as a whole of the Mitakshara, their Lordships refer to the fact that in the other schools of Hindu Law, *stridhana* has been expressly declared not to embrace property inherited from the husband. It is thus clear that the Privy Council far from overruling or questioning the authority of the text, only interpret, *i.e.*, consistently with the other texts of the Mitakshara and in conformity with the general principles of Hindu Law which *Vijnanesvara* in common with Manu, Katyayana, Narada and others is held to have laid down. It is said that, according to that principle, a Hindu widow takes but a qualified estate in property inherited from the husband. In the result, the Privy Council construe clause 2,

section II, of the Mitakshara so as to exclude from the definition of *stridhanam,* the property inherited by a widow from the husband. These two decisions were followed in the later case in *Chotai Lall* v. *Chunnoo Lall,* 6 I. A., 15, which was a case of a daughter's inheritance to her father's property.

In this last mentioned case, the Privy Council observe that the original text of Yajnavalkya where the term "*Adi*" therein used is properly rendered into "or the like" does not afford any foundation for the argument in favor of the right of the widow and daughter to the entire interest in land acquired by inheritance. The Privy Council do not say that the text of the Mitakshara is of no authority; they merely say that that must be construed along with the other parts of the Mitakshara and that the reasons by which the argument in favor of the widow taking an absolute estate was answered by their Lordships in the previous cases were for the most part applicable to the case of a daughter. Accordingly they hold that under the Mitakshara, a daughter takes only a qualified or restricted estate in property inherited from her father, and that upon her death, the heirs of her father and not her own heirs are entitled to such property. Their Lordships observe: "They do not think this rule is opposed to the *spirit and principles* of the Law of the Mitakshara, on the contrary, it appears to them to be *in accordance with them.*" After this express declaration by their Lordships, it is idle to contend that they overrule or question the authority of the Mitakshara; on the other hand, they have only decided, as they themselves say, in accordance with the spirit and principles of the Law of the Mitakshara. In the latest case on the point which follows the above rulings, the Privy Council state it is impossible "whether with regard to the authority of other commentators or *to the other parts* of the Mitakshara itself, to construe this passage (Mitakshara, Chap. II, Section XI, *placitum* 2) as conferring upon a woman taking by inheritance *from a male* a *stridhanam* estate transmissible to her own heirs," *Muthu Vaduganadha Tevar* v. *Dora Singha Tevar,* 3 Mad. at page 301. The above rulings relate only to cases of inheritance *from a male* and have nothing whatever to do with cases of inheritance from a female. The Privy Council say nothing as to the extent or nature of the estate taken by a woman in property inherited from a female; and as already explained the reference to the other

commentators is only by way of fortifying the view they take of the Mitakshara itself.

Are there any such reasons for holding that the doctrine of *stridhanam* laid down in *verse* 2 of section XI of the Mitakshara cannot be consistently held to apply to cases of *stridhanam* inherited from females? Are there any texts which specifically lay down that women take only a qualified estate in such properties? Again are there any parts of the Mitakshara which are positively inconsistent with *verse* 2 just as there are for instance *verses* 11 to 25 of the same section with respect to property inherited from the husband? It is submitted that no such texts are discoverable and that none such has been pointed out by the advocates of the doctrine of limited interest. Again, is the view of women taking an absolute estate in property inherited from females, inconsistent with the principles and spirit of the Mitakshara? Far from being inconsistent, that view is eminently in harmony with its doctrine. As has been pointed out by Messrs. West and Bhuler in their Digest and by Dr. Jolly in his Tagore Law Lectures on Hindu Law, Vijnanesvara was able to effect a beneficial change in the old Smritic law and to place women almost on a footing of equality with men as regards this capacity to hold and deal with property. It was by his all comprehensive doctrine as to *stridhanam*, by his doctrine that property exists not merely for religious observances (which women are unfit to perform) but for secular purposes also and by other such bold teachings, that he was able to effect this reform in favor of women's rights. But as already stated the tendency of the decisions in Madras is in favour of placing on a footing of equality as regards the incidents of succession and alienation, *stridhanam* inherited from a female and *stridhanam* inherited from a male. The decision in *Sengamalathammal* v. *Velayuda Mudali* is cited as the leading case on this subject in this Presidency, and it is followed in later cases. It, therefore, becomes necessary to subject this decision to a somewhat critical examination. The case was one where the property in dispute was inherited by a woman from her mother. The Court observed —" Though according to the Mitakshara property acquired by inheritance is classed as *stridhanam*——this is contrary to all the authorities in the other schools of the Hindu Law and is not supported by the Smrithi Chandrika." Again "It is quite certain that all properties that a woman derives by inheritance

cannot be so classed if it be meant thereby that the peculiar course of succession applicable to women's special property is to be applied to it, for in Southern India as elsewhere, the property which a widow inherits from her husband cannot so descend, nor according to the case in this Court already mentioned property inherited by a mother from her son."

The argument that property inherited by a woman from a male descends in the line of the heirs of the last male owner is not entitled to as much weight as at first sight it may appear to possess. This view of *stridhanam* inherited from a male being transmissible to the heirs of the last male owner, has rather been the result of consistently following the other fundamental doctrines of the Hindu Law laid down or taken to be laid down in the Mitakshara itself, and it merely brings into harmony with section XI of the Mitakshara the other section of that work. Speaking of section XI, chap. II of the Mitakshara, Mayne observes: "No part of this section of the Mitakshara applies in terms to property which a woman has inherited from a male. But the reason for that obviously is, that the devolution of such property had been exhaustively treated in the former sections of the same chapter. In those sections, he, the author, explained how a man's property would go to his widow, his daughter, his daughter's son, and in default of them to parents and others." "Vijnanesvara includes under the term *stridhanam*, property which a woman has acquired in any way whatever. The descent of that which she has derived from a male, that is, from a husband, father or son is treated of in the earlier section of Chap. II. That which she obtained otherwise is treated of in section XI."

But are there any such considerations of inherent inconsistency in applying the rules of descent laid down in section XI of the Mitakshara to cases of succession to *stridhanam* inherited from a female? None such has been pointed out in the ruling under notice. Lastly, there now remains to be considered whether the Smrithi Chandrika does not support the view that property acquired by a woman by inheritance from a female does not class as *stridhanam*. The passage in the Smrithi Chandrika relied on is in placitum 8, Section 3, Chap. XI, and runs thus:—"Whatever the mother takes she takes for herself *like* the *stridhana* called *adhyagni* and the like,

and not for the benefit of both herself and her husband." Their Lordships do not explain how the passage in question can be regarded as an authority for their position. It may be argued that the expression *like* shows that property acquired by a mother by inheritance does not in itself constitute *stridhanam;* it is only *like stridhanam* and cannot, therefore, descend as such.

The argument based upon inference from the use of the term *like* cannot, however, bear much scrutiny. Throughout the *Smrithi Chandrika* there is not a single explicit statement that property acquired by inheritance does not constitute *stridhanam.* On the other hand, whatever indication there is in the *Smrithi Chandrika,* is rather in favour of the position that the expression *stridhanam* is wide enough to include property acquired by inheritance. After quoting Manu's description of the sixfold property of a woman, the author of the *Smrithi Chandrika* states that Manu's enumeration is not to be taken as a restriction of a greater number but only as a denial of a less, and in support of this view he invokes the authority of Yajnavalkya and Vishnu. See *placitum* 3 and 4, section 1, chap. IX. Again in *placitum* 11 the author of the *Smrithi Chandrika* gives instances of properties which are not to be classed as *stridhanam.* It is significant that property acquired by inheritance does not find a place in *placitum* 11. But the opinion expressed in paras. 3 and 4 in favour of a woman acquiring property in more ways than six is in favour of the view that property acquired by inheritance might be classed as *stridhanam.*

Now *placitum* 8, S. 3, Ch. XI is perhaps more open to the construction that fortifies the opposite view. It may be said that the point of resemblance, referred to therein, relates to the power of dominion which a mother has over property acquired by inheritance from her son. And this interpretation is supported by the preceding expression, "*takes for herself*" which means *takes absolutely* in the same way as she takes an absolute estate in *stridhanam* called *adhyagni.* The context also favours this interpretation. The sentence in question is intended to controvert Samboo's opinion, that in the case of property left by a deceased son the parents take a joint estate for the benefit of both.

If the above view that the mother takes an absolute estate is accepted, then there can be little doubt that it will descend in the

same way as *stridhanam* proper. The passage in question will then be a distinct authority against the view taken by the Madras High Court. In the passage in question the discussion is as to which of two parents is entitled to succeed before the other to the property left by a son. *Samboo* states that this discussion is uncalled for, inasmuch as whatever may be the order of succession, they take not an absolute estate, but only an estate for the benefit of both. The author of the *Smrithi Chandrika* states that this discussion is not uncalled for, but is necessary and states for this reason, that *Samboo's* position as to a joint estate being taken by his parents is not tenable, inasmuch as the mothor takes the property for herself like the *stridhanam* called *adhyagni.* Evidently the point of comparison is about the mother's estate in the inherited property being absolute as in the case of *adhyagni* which is a typical specimen of *stridhanam* proper. To infer that the expression *like* shows that the inherited property is not *stridhanam* is farfetched.

There is no question there at all as to inherited property being classed as *stridhanam* or not. Passing on to the other portion of the argument that the point of resemblance spoken of might be with reference to the course of succession applicable to inherited *stridhanam* property, we may say that the inference if any is against the view of their Lordships. The point discussed relates to inheritance and it may not be unnatural to suppose that the point of resemblance referred to is also about the order of succession. In opposition to *Samboo's* view the author of the *Smrithi Chandrika* maintains that the mother takes an absolute estate in such property and that after the mother the mother's daughter will succeed and not the mother's husband as in the case of *adhyagni* and other *stridhanam* properties proper. Again it is to be noticed that the rule of law contained in this passage of the *Smrithi Chandrika* as to a mother taking an absolute estate in property from her son, has not been considered as sufficiently authoritative and has not been followed by the Madras High Court.

In *Buchiraju* v. *Venkatappadu,* 2 M. H. C. R., 402, it was ruled that a mother inheriting from her son has not an absolute property in the estate she inherits, but only a limited interest. If this passage then has not been taken to be sufficiently authoratative and the rule

of law therein laid down has not been accepted as sound, how can a mere inferential argument based upon the use of a certain term be entitled to any weight.

Further, as already pointed out the inference appears to be unwarranted and too much strained in the light of the other portion of the Smriti Chandrika. The inference is also not supported by any passage in section I, Chapter IX of the *Smrithi Chandrika* which expressly treats of the different descriptions of *stridhanam*. On the other hand, there is nothing in section III, Ch. IX, which deals with succession to woman's property to show that the peculiar course of succession applicable to *stridhanam* property is not applicable to property inherited from a female. Paras. 1—15 deal with succession to three specified kinds of *stridhanam* properties. Para. 16 and subsequent paras. deal with maternal estates other than the three kinds noticed in the previous paras. The scope of the 16 subsequent paras. is sufficiently comprehensive so as to include even cases of properties inherited from the mother or other female relations. Lastly, the so-called inference can at the highest extend only to *stridhanam* inherited from a male; for the passage in question relates to property inherited by a mother from her son and not to property inheited from a female. The only safe conclusion then appears to be that the passage relied on does not show that property acquired by a woman by inheritance from a female does not descend as *stridhanam* proper. We have thus seen that the grounds of the decision in *Sengamalathammal* v. *Valayudha Mudali* appear to be questionable. Of the later decisions which follow this ruling the case of *Venkataramakrishna Rau* v. *Bujunga Rau*, I. L. R., 19 M. 107, does not point out any additional grounds.

The case of *Veeraangappa* v. *Rudrappa*, I.L.R., 19 M., 110, formulates certain additional grounds in support of the position that property inherited from a female does not descend as *stridhanam* proper. The learned Judges (*Best* and *Subrahmania Aiyar*, J. J.) deal with the argument that there is no reason for holding that the Mitakshara rule of succession laid down in section XI is not applicable with respect to property inherited from a female. The argument appears to have been misunderstood by the learned Judges. It does not assume as has been erroneously supposed by them that Vijnanesvara does not include in his description of

stridhanam, property inherited by a female from a male. Nor is such an assumption necessary to the validity of the argument. The argument is that the Mitakshara lays down a peculiar course of succession as being applicable to *stridhanam* or woman's property including property acquired by a woman by inheritance (whether from a male or a female); that though this rule of succession has been held inapplicable to *stridhanam* inherited from a male, still it does not necessarily follow that the same is inapplicable even to *stridhanam* inherited from a female. But the learned Judges take for granted the very point in dispute. They assume that because as to a portion of the inherited property of a woman the Mitakshara has not been followed, it, therefore, necessarily follows that it must be overruled likewise with respect to all the other inherited property of a woman. Starting with this assumption, their Lordships very properly conclude that the only way to support the argument is by contending that the case of property inherited from a female does not fall within the scope of the text of the Mitakshara which, according to their assumption, has been *fully and completely* overruled. But, as we have just now stated, the argument has been misunderstood by their Lordships. And we have already shown that the grounds upon which section XI of the Mitakshara has been held inapplicable to *stridhanam* inherited from a male are not applicable to cases of *stridhanam* inherited from a female. There is one more observation of their Lordships which remains to be noticed. They say that so far as this Presidency is concerned the Courts in rejecting Vijnanesvara's doctrine that the word, '&c.', in the Yajnavalkya *Smrithi* relating to what constitutes stridhanam, includes property inherited, have not proceeded solely on the authorities peculiar to the Dayabhaga school, but have been influenced considerably by the fact that the *Smrithi Chandrika* and the *Dayavibhaga or Madhaviyam* have put an entirely different construction on the same word in the said text." But this position does not advance the argument very far. It only shows as pointed out by the Privy Council in 6 I. A., page 15, that Yajnavalkya's definition of *stridhanam* does not, whereas Vijnanesvara's definition does, include property acquired by inheritance. Whatever may be Yajnavalkya's definition, does not Vijnanesvara there expressly state that property inherited is *stridhanam?* The Mitakshara, though it purports to be a commentary upon the institutes of Yajnavalkya, is in

itself an independent authority. It has introduced very many additions supplementing the institutes of Yajnavalkya and these additions are held binding in Southern India. The Privy Council do not say that Vijnanesvara is no authority because he differs from Yajnavalkya; on the other hand, they treat the Mitakshara text (*verse* 2, Chap. II, S. XI) as an authority only to be construed along with the other texts of that work and their Lordships refer to the other secondary authorities more by way of fortifying the conclusion they arrive at upon a consideration of the whole of the Mitakshara and of the leading doctrines therein laid down.

There are also other considerations which seem to point to the soundness of the view herein submitted. *Placitum* 30, S. XI, Ch. II of the Mitakshara lays down a special rule of succession to the inherited property of a maiden daughter; of which inherited property, it is held, she by that special rule appears to be made a full owner. Now with reference to property inherited by a maiden daughter from a male this position of the Mitakshara cannot now be considered to be any longer tenable. But with respect to property inherited from a female, it has been held that in accordance with the Mitakshara the maiden daughter takes an *absolute* estate, see *Narasayya* v. *Venkayya* 2 M. L. J. Rep., 149. And this decision has been considered in the case of *Venkataramakrishna Rau* v. *Bujanga Rau*, as laying down the law correctly and as being in consonance with the whole course of decisions in this Presidency, commencing with the ruling in *Sengamalathammal* v. *Velayuda Mudali*. The Court observed "The property was *stridhanam* in the hands of her mother, but it is *settled law* that such property when inherited by a daughter ceases to be *stridhanam* in her daughter's hands." "The succession to a maiden daughter is *the sole exception* to this rule; and in all the other cases quoted the question has been as to succession to a "*married* daughter." In other words the same property when taken by a maiden daughter will pass to her with absolute ownership, but when taken by a married daughter will pass to her with only a limited interest without power of alienation, except perhaps for necessity. It is thus seen from the above that the overruling of the law laid down in *placitum* 30 of the Mitakshara with respect to a portion of the inherited property of a maiden daughter, *i.e.*, to property inherited from a male, has been considered as not

rendering infructuous that rule of law with respect to the rest of the inherited property of a maiden daughter, that is to say, property inherited from a female. Does not then the same argument apply in favour of the operation of the Mitakshara rule of law laid down in placita 8-25, with respect to the inherited property of a married woman so far as such property may have been inherited from a female. With equal logic it may be said that the fact that the Mitakshara law of succession has been overruled with respect to a married woman's property inherited from a male, does not necessitate the conclusion that the Mitakshara rule of law must be taken to be inoperative with respect to married woman's property inherited from a female. It is hardly necessary to point out that the daughters whether married or unmarried inherit under *placita* 8-25. It is only with respect to succession to their estate different texts apply. *Placita* 8-25 apply to one case while *placitum* 30 applies to the succession to a maiden daughter. Now *placitum* 30 does not expressly state that the maiden daughter takes an absolute estate, but from the provisions that her heirs succeed to her property it is inferred that she takes an absolute estate. The inference is that because her estate passes to her own heirs she possesses an absolute estate. The same argument might be extended to *placita* 8-25. They say nothing expressly as to the nature of the estate taken by a married woman inheriting to a female; and from the provision that her own heirs succeed we can with as good logic infer that she takes an absolute estate. In short *placita* 8-25 do not any more than *placitum* 30 lay down one rule of succession as to limited interest and another rule of succession as to absolute interest left by a deceased woman. We shall presently show that the inapplicability of *placitum* 30 cannot furnish any argument against holding that an absolute estate was taken by the woman.

Again as it has been shown above, the net result of the whole course of decisions in this presidency is this: The same property when taken by a maiden daughter will pass to her with absolute ownership, but when taken by a married daughter will pass to her with only a limited estate. Let us test this position, by working it out to its full logical consequences. Let us first compare the case of a daughter who dies a maiden with that of a maiden daughter who subsequently marries. If the maiden daughter takes an absolute estate, it must relate to the time when the inheritance

opens. For it is at that point of time that the maiden daughter's acquisition of property by inheritance takes place. Suppose the maiden daughter subsequently marries and dies issueless, then clearly *placitum* 30 which applies to the property left by a maiden cannot govern the case; it is only the general rule laid down in *placita* 8-25, that must govern the devolution of the property of which the deceased continued to be full owner from the time the deceased herself inherited down to the time of her death.

In both these cases, it is undoubted that the heirs of the daughters themselves succeed, for in both the cases the propositus was full owner. Now, in these two cases, the succession by the daughters was under the same texts; though the succession to them is no longer under the same text. In one case it is under *placitum* 30, in the other, under *placita* 8-25; the non-applicability of *placitum* 30 in the latter case does not in any way show that the propositus did not take a full estate. It is thus clear that no argument against taking an absolute estate can be founded upon the inapplicability of *placitum* 30 to regulate the succession to the propositus. Let us next compare this intermediate case of a daughter who was a maiden at the time she inherited, but who subsequently married with the case of a daughter who all along was married.

It is said that the heirs of the daughter who was unmarried at the time she inherited but was married at the time of her death will succeed in preference to the heirs of the mother of such a daughter. But if the daughter was not a maiden but was married at the time she inherited, it is said, that she cannot transmit it to her own heirs, but that her mother's heirs will succeed. What difference could there exist in principle between these two cases. *Placitum* 30 of the Mitakshara is no longer applicable either to the one or the other of these cases. They are both governed by the general rule laid down in *placita* 8-25 of the Mitakshara. Beyond the accidental difference of one daughter being married at the time and the other remaining unmarried, there is no difference whatever between the two cases.

In the case of the maiden daughter subsequently married and of the daughter married already the inheritance by them was under *placita* 8-25 or strictly speaking under *placitum*, 13 they both

succeeded under the same texts. Again in both the cases the succession to them is under the same texts, for *placitum* 30 is no longer applicable. These texts are silent in the same way as *placitum* 30 as regards the interest taken by the propositus and all these texts are no longer authorities with respect to property inherited from a male. To be consistent, in both the cases, the propositus must be held to have taken an absolute interest, for both the cases have identically the same features. If in the case of a maiden daughter subsequently married, she is held to have taken an absolute estate, we must also hold that in the case the daughter married already, she takes an absolute estate. If inapplicability of *placitum* 30 does not stand in the way of holding that the maiden daughter subsequently married took an absolute estate, that cannot also be a reason against holding that the married daughter also took an absolute estate.

The scheme of the Mitakshara also appears to support the view herein put forward. In Chap. II the Law of Inheritance is laid down. The previous portion of the chapter deals with succession to a man's property. In the latter portion of the same chapter Vijnasasvara lays down the law of succession with respect to the devolution of woman's property; here too there is formulated a complete table of succession. These two tables of succession appear to be independent of each other. They seem to be completely exhaustive of the entire subject of succession. There is no necessity to supplement these by introducing any third line of succession. Their relative applicability has alone to be determined; that can be done by resorting to the fundamental doctrines of the Hindu law. The application of such doctrines has led to the position that in properties left by males, females take only a restricted heritage, but that in properties left by females, males take an absolute heritage. But there is no reason derivable from any paramount doctrines of the Hindu law, to support the position that females take only a restricted heritage in properties left by females, or the view that a third order of succession in modification of the order set out in the latter part of Chapter II of the Mitakshara may be applied to cases of *stridhanam* inherited from females.

If it can be conclusively established that a married woman takes only a restricted estate in property inherited from a female,

it follows as a logical consequence, that the property must after her death revert to the heirs of the last full owner, as the inheriting woman's interest ceases with her life and she leaves no outstanding interest of her own to be inherited by her heirs. In that view, the doctrine of reverter follows as a logical consequence and the non-mention of such a doctrine in the Mitakshara is no reason for not applying it. But if on the other hand, it is not clear that the inheriting woman takes only a limited interest, then the absence of any reference to such a doctrine in the Mitakshara will be an argument in favor of the view that in cases of doubt, that view should be adopted which would not involve the application of such a doctrine. In other words, the view that women take an absolute estate must be allowed to prevail. As observed by Mr. *Justice Telang* the doctrine of property reverting to the heirs of the last full owner is one which is nowhere expressed in the Mitakshara; and "it is not necessary or allowable to introduce that conception into the theory of *stridhanam*, without some basis for its being found in the original authorities," see *Manilal Revadat* v. *Bai Rewa*, I. L. R., 17 B., p. 758, at p. 768.

Looked at from this point of view the fact that the Mitakshara does not offer any basis for the doctrine of reverter is an argument in favor of holding the view herein put forward.

We shall now proceed to notice a few decisions that bear upon the points under discussion. The ruling in *Buchi Raju* v. *Venkatappadu*, 2 M. H. C. R., 402, is in favour of the view herein advocated. The High Court observed that some inherited property as that inherited from a mother will be rightly classed as *stridhanam*. The decision in *Narasayya* v. *Venkayya*, 2 M. L. J. Rep., 149, enunciates the same doctrine. Though this case was a case of succession to a maiden daughter, yet it laid down the wider proposition that "when a daughter succeeds to her mother's *stridhanam* she is as much full owner as her mother and it is her heirs and not her mother's heirs that are entitled to take." Such has been conceived to be the effect of this ruling by Mr. *Justice Subrahmania Aiyar* in *Veerasangappachetty* v. *Rudrappachetty* (I. L. R., 19 M., 110 at pp. 117-118), though the rulling has been understood to apply to the case of maiden daughter alone by Mr. *Justice Parker* in *Venkatarama Krishna Rau* v. *Bujanga Rau*, I. L. R., 19 M., p. 108. There

appears to exist no other reported decisions on the point. The rulings to the contrary have already been noticed and examined.

Again in the recent case of *Salamma* v. *Latchmana Reddi*, 8 M. L. J. Rep., 14, to the decision in which Mr. *Justice Subramania Aiyar* was a party, the court observed that the Mitakshara has on account of its innovation in favor of women and other causes become the chief authority on Hindu law and that a "departure from the law laid down by such a high authority *must not be* made unless supported by adequate grounds." The Court accepted the authority of the Mitakshara in opposition to that of the Smriti Chandrika and gave effect to the all comprehensive doctrine of Vijnanesvara with respect to *stridhanam*. In this case also their Lordships, however, treat the point now under discussion as having been already established by Judicial decisions against the authority of Vijnanesvara. Again in another recent case, *Muttappa Udayan* v. *Ammani Ammal*, 8 M. L. J. Rep., p. 9, the Madras High Court gave effect to the Vijnanesvara's doctrine of *stridhanam* with all its attendant incidents of succession in opposition to the authority of the *Smriti Chandrika*. If the paramount authority of the Mitakshara is recognised in these cases of *stridhanam*, why should it not be given effect to with respect to properties inherited from a female? Any other view, it is respectfully submitted, would only try to perpetuate the archaic smritic law against women, under which women were unfit to hold and deal with and to inherit property. Vijnanesvara under the usual pretext of rightly interpreting the old texts introduced advanced views and adapted the old law to the changing circumstances of modern society. It is submitted that that wholesome development of the Hindu law by Vijnanesvara should instead of being checked by our courts on the authority of obsolete smritic views, be on the other hand, maintained and be given effect to according to the later doctrines laid down in the Mitakshara. At a time when even the Mitakshara itself is felt to be behind the requirements of modern society and modern conditions (Mayne's Hindu Law, Section 38), to refuse to follow the spirit of the Mitakshara in these matters will lead to an undesirable state of stagnation and will end in doing what Vijnanesvara wished to avoid doing—namely, perpetuating the old law whose spirit had died away.

It is encouraging to find that the view herein submitted has the authority of Mr. Mayne's Hindu Law, 5th edition, para. 627. The order of succession in the case of property inherited by a female from a female has not till very lately received any discussion. Vijnanesvara uses the term (*stridhanam*) in its general sense and declares that all the property included in that term (except sulka) goes in the line of female heirs. I have already offered reason for supposing that he was not referring to property which she had inherited from males, but there is no reason why he should not have included property inherited by her from a female. ?

M. K. VAIDYANATHA IYER.

TRANSLATION FROM THE VIVADARATNAKARA.

CHAPTER XXXV.

On Partition after Re-union.

On this subject, Manu says :—" If brothers once divided live again together and make a second partition, the division shall in that case be equal and the eldest shall not there take an additional share."(1) *Commentary*—' Living together' means ' living together as co-parceners.' The division shall be equal and no deductions shall be allowed in favour of the eldest, etc.

Again the same author says: "If among them, the youngest or the eldest is deprived of his share, or if either of them dies, his share is not lost."(2) *Commentary*—If [among re-united brothers one loses his share by becoming a *sanyasin*, etc., or dies, his share is not then lost.

Then as to the question who takes it, the same author says: " His brothers by the same mother having assembled together shall divide it equally as well as those brothers who were re-united and uterine sisters."(3) *Commentary*—' Of the same mother' qualifies ' brothers.' Therefore, it is clear that it is only such of the brothers as are re-united with him and are born of the same mother that take the share. '*Sanābhayah*' means ' born of the same womb.

(1) Manu, Chap. IX, 210. (2) Manu, Chap. IX, 211.

(3) Manu, Chap., IX, 212.

Prakāsakāra says that of these the un-married only are here meant; because the married belong to the *gotra* of the husband.

Brihaspati says: "Those two who after division live again together affectionately, inherit to each other."(1)

Again he says: "When brothers who after division live again together out of affection, there is no question of priority among them at a second partition. When any of them dies or becomes a *sanyasin* from any cause, his share is not lost and it goes to his uterine brother; and his sister is entitled to a share out of it. This rule applies in the case of the deceased who left no issue, wife or father. If one among the re-united brothers acquire wealth by learning, valour or the like, two shares must be given to him and the rest shall have one share each."(2) *Commentary*—Wealth acquired by learning, valour and other kinds of wealth to the use of which he is exclusively entitled.

Nārada says: "The share which belongs to a re-united coparcener is declared to be his own. So when one of the sharers has no issue, it shall go to the rest after those who are childless."(3) *Commentary.*—'*Athonyahdá*' means 'in the absence of the re-united coparceners.' '*Nirbījeshu*' means 'who have no children.' '*Itarān,*' *i.e.,* 'those who have no share being not re-united.' '*Eyar*' means 'shall go.' Prakāsakāra says that they alone are heirs even though they have sons—and that the brother's share goes to the childless. Pārijāta, however, reads '*Anamshabhājah*' for '*Amshabhājah*'; but this reading has been abandoned, because it does not agree with many books.

Sankha says: "If one among the brothers leaves the country or dies, the rest shall divide his wealth except the *stridhana.* They shall also maintain his women for their lives, if they keep their husband's bed inviolate; but they shall refuse maintenance to other women. To his daughter, her father's share should be given for maintenance."(4) *Commentary.*—The women here meant are those who do not strictly perform the duties of widowhood but are not unchaste. The 'wife' in the text 'of the man dying without wife or father' refers to the wife who strictly performs the

(1) Brihaspati, Chap. XXV, 76.
(2) Brihaspati, Chap. XXV, 73—75 and 77.
(3) Narada, Chap. XIII, 24.
(4) Found in Narada XIII, 25—27.

duties of widowhood and is not unchaste. Pārijāta, however, says that 'women' here means women of the same class. Therefore, according to his view the word 'wife' in the text refers to the first wife of equal caste. 'To others' means 'to those who do not keep their husband's bed inviolate.' Kalpataru says that the daughter is entitled to as much wealth as is necessary for her maintenance till marriage and for the expenses of the marriage.

Yājnavalkya says: "The re-united brother inherits the wealth of the re-united deceased and shall give a share to the re-united born. The uterine brother shall take the share of the deceased uterine brother and shall give a share to the uterine brother born."(1) *Commentary.*—Of the deceased re-united heir, the re-united coparcener shall take the wealth and not the heir of the deceased. The uterine brother inherits to the uterine brother. The meaning is where brothers of different mothers unite, the uterine brother takes the wealth of the deceased re-united coparcener.

If now a re-united coparcener dies leaving his uterine brother not re-united with him, and his brother by a different mother re-united with him, the same author says: "A brother by a different mother if re-united, not any other half-brother, shall inherit the wealth. But a uterine brother though not re-united shall take it and not a brother by a different mother."(2) *Commentary.*—A brother by a different mother shall not take the wealth, if not re-united. By this text, both by the methods of agreement and difference, it is established that one being born of a different mother and living in re-union gives him a right to take the wealth. The word 'samsrishti' should not be read into the next clause. Therefore, one living in re-union also takes the wealth and if it is asked who it is, it is said that he is one born of the same blood and semen, *i.e.*, a uterine brother. By this portion of the text the right of a uterine brother though not re-united is established. Thus both these, having the right to take the wealth, are declared heirs. The same is the meaning of the reading '*Nānyodharadanam haret*' found in Kalpataru. '*Anyodharadanam*' means 'the wealth of a brother by a different mother.' The meaning is that a half-brother not re-united shall not take the wealth of his half-brother re-united. But others think the meaning according to the above reading is clear.

(1) Yajnavalkya, Chap. II, 138. (2) Yajnavalkya, Chap. II, 139.

Kātyāyana says: 'Of brothers, the re-united inherit to the re-united and the dis-united to those dis-united, in default of the wife, etc., of the deceased; for they inherit to each other if they have no issue."(1) *Commentary.*—When re-united brothers die, re-united brothers inherit; when dis-united brothers die, dis-united brothers inherit. 'Above' means 'in default of the wife, etc.' '*Nirbījanyenyabhāginah*' is a Dvandva compound.

Brihaspati says: "He is said to be re-united who having made a partition lives again out of affection with joint property in the same house with his father, his brother or his paternal uncle."(2) *Commentary*—The particle '*va*' indicates the existence of other alternatives. Thus even where after partition with his paternal uncle's son, he lives again with him in this manner, he is recognized all the world over as a re-united coparcener. Prakāsakāra, however, says that on the strength of this text re-union is not permitted among others than those here mentioned.

Here ends the chapter on "Partition after re-union."

CHAPTER XXXVI.

On the determination of the fact of partition.

On this subject, Nārada says: "Should the fact of a legal partition among coparceners be doubted, the determination of the point rests on the evidence of kinsmen, the partition deed and the doing of business severally by them. Among undivided brothers the performance of religious duties is single; but where a partition had been made they have to perform these duties, every one for himself. Gifts, receipts, cattle, food, houses, lands, and servants should be regarded as separate among divided brothers, as also cooking, religious duties, receipts and disbursements. Giving evidence, becoming a surety, giving or taking (money) may be performed by divided brothers but not by undivided brothers. Those brothers who perform their duties with their individual wealth should be regarded as divided even in the absence of a document."(3) *Commentary.*—'*Vibhāgadharmah*' means 'the fact of partition.' When it is doubted, i.e., when it is not known whether it has been made or not, it should be determined by the kinsmen of the coparceners.

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(1) Not found. (2) Brihaspati, Chap. XXV. 72.

'Deed of partition' means 'the document evidencing partition.' 'Doing of business severally by them' means 'from the fact of their keeping separate accounts of receipts and disbursements, etc.' 'Religious duties' means 'Vaisvadeva and other rites to be performed.' '*Āgama*' means 'income.' '*Vyaya*' means 'disbursement.

Yājnavalkya says: "When the fact of partition is denied, the truth of it must be ascertained by the evidence of kinsmen, near or distant, by written record, and by separate transactions in respect of houses and lands."(1) *Commentary*—'*Yautaka*' means 'divided' according to the meaning of the root '*yu*,' *i.e.*, to mix.

Again the same author says: "Among brothers, among husband and wife, and also among father and son, standing surety, borrowing and giving evidence are declared inadvisible where they are undivided."(2) *Commentary*—The word '*Parasparam*' (mutually) should be read into the text. Although Ápastamba points out that there is no possibility of a partition between husband and wife, still seeing that according to the text 'if the shares are made equal, then the wives also must be allowed to have equal shares,' Yajnavalkya could have contemplated a partition between the husband and the wife, and spoken of the husband and the wife in view to such cases; thus, there is no inconsistency.

Brihaspati says: "Those who keep their receipts and disbursements and wealth separately and lend money or trade mutually are mutually divided."(3) *Commentary*—'*Parasparam*' means 'without acting together;' or in effect, independently of each other. The word '*pritak*' at the beginning of the first verse should be read along with the second verse also.

Here ends the chapter on the determination of the fact of partition.

CHAPTER XXXVII.

Rights of co-parceners after partition.

On this subject, Nārada says: "If many persons descended from the same ancestor are separate in the performance of religious

(1) Yajnavalkya, Chap. II, 149. (2) Yajnavalkya, Chap. II, 52.
(3) Brihāspati, Chap. XXV, 92.

duties, their business transactions and their working utensils do not act together"(1) Commentary—This contemplates the case of many descended from the same person. '*Pritakdharmāh*' means 'performing their sacrifices, etc., separately.' '*Pritakkriyáh*' means 'having separate dealings, such as lending money, etc.' '*Pritakkarmagunopetah*' means 'separately engaged in protecting children, agriculture, service, etc.' '*Karmeshusaiyatah*' means 'acting together.'

The same author says what result flows from this state of things: "They may give away, or even sell, or do anything they please with their shares. They are masters of their own wealth."(2) *Commentary.*—The word *all* occurring in the text should be restricted in its signification agreeably to other texts. The various texts from Brihaspati and others quoted in the chapter on "withholding of gifts" should be remembered in this connexion as they narrow the scope of this text.

Brihaspati says: "Whatever share a man has been enjoying shall not be changed from him. Should one, having made a partition, contest it subsequently, he shall be fixed by the king to his own share and shall be chastised if he persisted in the contention."(3) *Commentary.*—Whatever share has been enjoyed by one who entered into a partition of his own free will shall alone be his share. All the rest of the verse only emphasises the principle.

Here ends the chapter on the rights after partition.

S. SITARAMA SASTRI.

(1) Narada, Chap. XIII, 42. (2) Narada, Chap. XIII, 43.
(3) Brihaspati, Chap. XXV, 94 and 95.

EQUITABLE SET-OFF.

Section 110 of the Code of Civil Procedure lays down the conditions under which a legal set-off can be claimed by the defendant in a suit. "Set-off at law is founded on Statute and to prevent cross-actions. It was not intended to give new rights, except to the extent of giving facilities for the enforcing of rights which were already enforceable in an action; and it has always been accordingly held that a set-off can only be successfully pleaded when an action could have been maintained for the same debt." *Rawley* v. *Rawley*, 1 Q. B. D., 469. If the defendant's counter-claim or set-off falls under the aforesaid section, he can claim as of right to have it investigated in the same suit. Though not expressly provided for in the Code, it has frequently been held that the Courts in this country can entertain counter-claims where it would be inequitable to compel the defendant to have recourse to a separate suit. As the Lord Chancellor said in *Exparte Blagden*, 1 Ves. 465, "there is a difference upon set-off in equity and at law. In equity, it prevailed long before the statute. It must be a strict set-off at law or a case of mutual debt or credit." In *Clark* v. *Ruthnavaloo*, 2 M., H. C. R., 296, the Madras High Court, in referring to the corresponding sections of Act VIII of 1859, said: "These are provisions of a Code regulating procedure only, and whilst we think that the language used has not the effect of enlarging the right of set-off, we ought at the same time to say that, according to our present opinion, the Procedure Code was not intended to take away any right of set-off, whether legal or equitable, which parties would have independently of its provisions. It seems to us that the right of set-off will be found to exist not only in cases of mutual debts and credits, but *also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit.*" See also *Gauri Sahai* v. *Ram Sahai*, 7 N. W. P., H. C. R., 157; *vide* also 20 W. R., 410. Similar decisions have been given in regard to the Procedure Codes of 1877 and 1882. (*Kishorchand* v. *Madhowji*; I. L. R. 4 B. 407. *Bhagbat* v. *Bamdeb*, I. L. R. 11 C. 557; and also *Brojendra Nath Das* v. *The Budge-Budge Jute Mill and Company*, *Ib.* 20 C. 527). In this country, both the legal and equitable jurisdictions are vested in one and the same Court; and "natural equity says that cross-demands should compensate each other, by deducting the less sum from the greater, and that the difference is the only sum which can be justly due." There is no doubt whatever that the Court would have jurisdiction to entertain such counter-claims as we are here discussing.

This right of set-off is based on the Roman Law of *Compensatio*; and as Sir Thomas Clarke, M. R., observed in *Whittaker* v. *Rush*, Ambler, 407, "Equity took it up but with limitation and restrictions and required that there should be a connection between the demands." The Roman Law was restricted within narrower limits. Referring to the Code, Lib. IV, Tit. 31, it will be found that the Judges are cautioned not to be too ready to admit claims by way of set-off, and not only the inconvenience but the injustice is pointed out of subjecting a party having a clear debt to a lengthened investigation in the suit upon a knotty and doubtful claim. The doctrine of *compensatio* is discussed at length by Moyle in his Roman Law, Vol. I, pp. 559, &c. In *Ramagopal* v. *Majeti Mallikarjanudu*, 1 M. H. C. R., 396, the Court held that questions as to set-off will be dealt with upon the principles of English Courts of Equity, or of the Roman Law of compensation and that no weight will be given to objections derived from the peculiar language of the statutes of set-off.

We shall proceed to consider the conditions that must be fulfilled before an equitable set-off can be successfully set up. In England cross-demands are allowed to be set up as a defence to any suit; and it is not necessary that the claim set up should be analogous to that of the plaintiff; a claim founded on tort may be opposed to one founded on contract, or *vice versa*: *Stooke* v. *Taylor*, 1880, 5 Q. B. D., 576. But in India, the claim of the defendant against the plaintiff must be connected with the same transaction and must arise out of one and the same contract as that in respect of which the plaintiff's suit is brought (*Roulet* v. *Fetterle*, I. L. R., 18 B. 719.) In other words the right of equitable set-off exists in cases where cross-demands arise out of the same transaction, or are so connected in the nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant should be driven to a cross-suit. As Story says in his *Equity Jurisprudence*, "It is true that equity generally follows the law, as to set-off, but it is with limitations and restrictions. If there is no connection between the demands, then the rule is as at law. But if there is a connection between the demands, equity acts upon it and allows a set-off under particular circumstances." In *Krishnasawmi Pillai* v. *Municipal Commissioners for the Town of Madras*, 4 M. H. C. R., 120, which was a suit brought for recovering money due under a contract made between the plaintiff and the defendants, it was held that the defendants were entitled to set-off the amount of damages which the defendants had proved they had sustained by reason of the plaintiff's breach of the contract sued on. In this case, securities were deposited

expressly to secure the due performance of the agreement and the proceeds would undoubtedly be applicable to the payment of damages sustained by the Commissioners by the plaintiff's breach of contract; and further, the Commissioners were expressly authorised with respect to any breaches of contract to treat the monthly hire as a fund in hand for the same purpose. The claim of the Commissioners to set-off the damages was allowed, the court observing: "though the defendant's claim be for *unliquidated* damages, that is, for an amount which can only be ascertained by the decision of a Court, yet that circumstance does not necessarily exclude the right of set-off at equity, though it does at law." *Kishorchand* v. *Madhowji*, I. L. R., 4 B. 407, was also a case in which a claim for unliquidated damages, was allowed to be set-off. See also *Pragi Lal* v. *Maxwell*, *Ib.* 7 A. 284, and *Niaz Gul Khan* v. *Durga*, *Ib.* 15 A. 9. In *Bhagbat* v. *Bamdeb*, *Ib.* 11 C. 557, only that portion of the counter-claim which arose out of the same transaction was allowed to be set-off. In *Chisholm* v. *Gopal Chander*, *Ib.* 16 C. 711, which was a suit for arrears of salary, the defendant sought to set-off a sum of money on account of goods and property damaged, lost, or not accounted for by the plaintiff. Both the lower courts decided in favour of the plaintiff; but the High Court remanded the case to the Court of first instance for re-trial, observing as follows:—"They were in the nature of cross-claims, and were so connected with the plaintiff's claim for salary as servant and agent of the defendant, that it would seem inequitable to compel the defendant to have recourse to a separate suit to recover them . . . . The claims as made by the defendant arise for the most part out of the relation set up by the plaintiff in this suit, as a suit of master and servant, or principal and agent; and so far as these items are claimed in respect of the alleged neglect or misconduct of the plaintiff in his capacity of servant of the defendant, we think that the defendant was entitled to have the claims enquired into. Of course, there may be, as regards each item, several reasons why the defendant may fail in recovering; still, those are matters which will have to be enquired into."

The amount of the defendant's counter-claim must be capable of being *immediately* ascertained. (*Kishorchand* v. *Madhowji*, I. L. R., 4 B. 407. See also 22 W. R., 1). In *Rawson* v. *Samuel*, Cr. and Phil., 161, an action had been brought by the defendant against the plaintiff for damages for refusing to accept bills, and it being made to appear that there was a complicated account between the parties, the Vice-Chancellor had refused to restrain the trial of the action, but had restrained the execution, if a verdict should be found for the plaintiff, in order that the account might be taken in equity. But the Lord Chancellor, on appeal,

held that the existence of a long and complicated account was not a ground for staying the execution and said: "It will be found that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross-demands is not sufficient. In the present case there are not even cross-demands, as it cannot be assumed that the balance of the account will be fouud to be in favor of the defendant-at-law. Is there, then, any equity in preventing a party who has recovered damages at law from receiving them, because he may be found to be indebted upon the balance of an unsettled account to the party against whom the damages have been recovered ? " This was the ground of the decision in *Dobson and Barlow* v. *The Bengal Spinning and Weaving Company*, I.L.R., 21 B. 126, where the set-off claimed was not allowed.

On the other hand, if the set-off claimed is remote and unconnected with the subject-matter of the dispute and the claim is made merely with a view to defeat or delay plaintiff's just rights, then the set-off claimed cannot be allowed: See I.L.R. 18 B. 721. Unless it can be shown that the defendant's claim of set-off rests upon some equity which impeaches the plaintiff's legal rights to recover his demand, there is no ground for allowing the set-off (*Beasley* v. *Darcy*, 2 Sch. and Lef. 403 n.) In *Young* v. *The Bank of Bengal*, 1 M. I. A., 87, it was held that mere deposit of Government paper or other security does not of itself constitute a giving of credit and that a debt contracted before and unconnected with the deposit could not be set-off against the claim of the depositor's assignees to recover the balances of the securities after paying the debts in respect of which they had been deposited. In *Clark* v. *Ruthnavaloo*, 2 M. H. C. R., 296, which was a suit brought against the acceptor to recover the amount due upon several bills of exchange, the defendant sought to set-off a claim for unliquidated damages unconnected with the bills of exchange. *Scotland*, C. J., and *Bittleston*, J., after a review of the English decisions, held that the defendant had no right to set-off his claim against the debt due to the plaintiffs.

Further, the amount claimed to be set-off should not exceed the pecuniary limits of the jurisdiction of the Court. As Lord Esher, M.R., observed in *Stunmore* v. *Campbell*, (1892) 1 Q. B. 317, a counter-claim has the same effect as a cross action and is treated as an independent action except for the purposes of execution. It, therefore, follows that when the amount sought to be set-off exceeds the court's pecuniary jurisdiction, then the defendant's claim cannot be allowed. In *Brojendra*

Nath Das v. *The Budge Budge Jute Mill Co. Ld.* I. L. R. 20 C. 517, decided by *Petheram*, C. J., *Norris* and *O'Kinealy*, J. J., a suit was brought in the Calcutta Small Cause Court to recover Rs. 1,197-5-6, being the price of goods sold and delivered; and the defendant claimed to set-off a sum of Rs. 2,738-4-0, being the loss sustained by the plaintiff's breach of contract and prayed for judgment for the sum of Rs. 1,540-14-6 after giving plaintiff credit for the sum claimed by him. It was held that the defendant's claim could be set off if it were one which the Small Cause Court had jurisdiction to try; but the claim being to obtain credit for or receive the entire sum of Rs. 2,738-4-0, the Small Cause Court was without jurisdiction and no set-off could, therefore, be allowed. The question whether a decree could be passed in favor of the defendant for any balance which might be found due to him was raised but not decided. On the other hand, if the same court has both Small Cause and Ordinary jurisdiction and the amount sought to be set-off does not exceed the pecuniary limits of its ordinary, though it exceeds the pecuniary limits of its Small Cause, jurisdiction, the set-off may be allowed. In *Rampratap* v. *Ganesh Rangnath*, I. L. R., 12 B. 31, which was a suit brought to recover Rs. 36-7-9 from the defendant under the Small Cause Jurisdiction of a Subordinate Judge, the defendant claimed to set off Rs. 72 which exceeded the pecuniary jurisdiction of the Judge as Small Cause Judge. On reference to the High Court, *Sargent*, C. J., and *Nanabhai Haridas*, J., held that the set-off might be pleaded by the defendant and that the Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff and his ordinary jurisdiction in trying the set-off.

Of course, the set-off can be allowed only in cases in which both parties fill the same character as they fill in the plaintiff's suit. In *Exparte Blagden*, 1 Ves. 465, it was held that a debt from a bankrupt to a married woman *dùm solà* could not be set-off against a debt from her husband to the bankrupt, and also that the claim of the bankrupt's assignees upon a policy made before the bankruptcy, but on account of a loss after the bankruptcy, could not be set-off against a debt from the bankrupt. Again, in *Freeman* v. *Lomas*, 20 L. J., ch. 564, which was a suit brought by assignees of a bankrupt for payment of a legacy, the defendant who was the executor and residuary legatee, claimed to set-off moneys which he had paid as surety for the legatee; and his claim was disallowed, *Turner*, V. C., observing as follows: "I believe upon examining the authorities it will be found that, except upon special circumstances, Courts of Equity have never allowed cross-demands existing in different rights to be set the one

against the other." As instances of cases where set-off is allowed under special circumstances, we may refer to the English cases of *Exparte Stephens*, 11 Ves. 24. *Cavendish* v. *Graves*, 27 L. J. ch. 314, and *Jenner* v. *Merris*, 30 L. J., ch. 361. In the first case, bankers who were under a direction to lay out money in certain annuities, in the name and to the use of S, did not do so, but representing that they had done so, made entries and accounted for the dividends accordingly; and S, relying on their representations, gave a joint and several promissory note with her brother to the bank, to secure the brother's private debt to them; and the bankers failed, and their assignees in bankruptcy sued the brother alone; and on a claim by S, and her brother praying that they might be at liberty to set-off what was due on the note against the debt due from the bankers to S, the Court allowed the set-off. In *Cavendish* v. *Graves*, certain bankers had assigned the securities given by a customer indebted to them without giving him any notice of the assignment. The bankers having become bankrupt and the assignees of the securities having brought actions in the names of the bankers against the customer, the latter filed his bill against the assignees of the securities; and in that suit, it was held that the plaintiff was entitled to set-off the moneys due to him on his running account against the debts secured, the assignees being in no better position than the bankers had been. In the last case, it was held that a debtor who had advanced moneys for necessaries supplied to the deserted wife of the creditor was entitled in equity to set-off such moneys against the creditor's legal demand. The ground of the decision was that the debtor making the advance stood in the same position in equity as the trades people who furnished the necessaries, and was entitled to the same remedies.

The mere existence of cross-demands has never been deemed a sufficient ground for the allowance of a set-off in equity: *Harvey* v. *Wood*, 5 Madd. 459. But, as the Lord Chancellor said in *James* v. *Kinnier*, 5 Ves. 110, "Courts of Equity give relief in all cases where, though there are mutual and independent debts, yet there is a mutual credit founded at the time on the existence of some debts due by the crediting party to the others. By 'mutual credit' in the sense in which the terms are here used we are to understand a knowledge on both sides of an existing debt due to one party and a credit by the other party founded on and trusting to such debt as a means of discharging it." See also *Watson* v. *The Midwales Railway Co.*, 36, L. J. C. P., 285. In *Jeff* v. *Wood*, 2 Peere, Will Rep. 129, the demands were on the one side, for a legacy by the assignees of the legatee who had become bankrupt, and on the

other, by the executor for money due to the testator's estate on account of the clothes, education and board supplied by the testator to the legatee when an infant. The Master of the Rolls decreed an account and declared that the executor was to pay only the surplus after deducting what was due from the legatee, as well to the executor as to the testator, observing as follows: "It is true, stoppage is not law; nor is it of itself a payment in equity; but then a very slender agreement for discontinuing or allowing the one debt out of the other will make it a payment, because this prevents circuity of action and multiplicity of suits which is not favored in law much less in equity. But it may be a doubt, whether an insolvent person may in equity recover against his debtor to whom he at the same time owes a greater sum, though I own it is against conscience that A should be demanding against B to whom he is indebted in a larger sum and would avoid paying it. However, it seems that the least evidence of an agreement for a stoppage will do; and in these cases, equity will take hold of a very slight thing to do both parties right, and it is still more reasonable that when the matter of the mutual demand is concerning the same thing, there the court should interpose and make the balance only payable."

The law on the subject of equitable set-off is thus summarised by *Fulton*, J., in *Dobson and Barlow* v. *The Bengal Spinning and Weaving Company* above cited;—"Though not expressly provided for in the Civil Procedure Code, it has frequently been held that the Courts can entertain counter-claims where it would be inequitable to compel the defendant to have recourse to a separate suit . . . . . So long, however, as the counter-claim or set-off does not fall under section 3, the defendant cannot claim as of right to have it investigated in the same suit. The question whether it is inequitable to compel him to resort to a separate suit, cannot be determined by any general rule, but depends on the facts of each case. In England, the discretionary power is recognized by orders XIX and XXII. In this country, though not conferred by Act, the discretion is exercised on general principles of equity. *Bhagbat* v. *Bamdeb*, I.L.R. 16 C. 711, may be referred to as a case where the Calcutta High Court refused to entertain part of a counter-claim which it considered too remote to be mixed up with the original claim. *Gray* v. *Webb*, 21 Ch. D. 802, is an instance where the Court in England, exercising its discretion under the orders, rejected a counter-claim. The discretion, it is true, is not an arbitrary power, but must be judicially exercised—*Huggins* v. *Tweed*, 10 Ch. D. 359." The principles which should guide a court in the exercise of its discretion have been above indicated.

Some points which have been decided in connection with this topic may also be incidentally noticed here. The law of limitation is not a bar to a set-off, unless the period therein prescribed has expired before the action is brought (*Walker* v. *Clements*, 15 Q. B., 1046.) Following this case, the Allahabad High Court has held that limitation will run from the time when the party claiming the set-off is actually damnified and will be reckoned to the date of the institution of the plaintiff's suit, and not to that of claiming the set-off. *Pragi Lal* v. *Maxwell*, I.L.R., 7 A. 287). In the same case, *Oldfield* and *Duthoit*, J. J., differed on another point, *i.e.*, whether the set-off claimed should be allowed in whole or in part, *Oldfield*, J., observing "if it is right to allow a set-off at all, it seems reasonable that it should be allowed to its full extent and not to admit it to the extent of merely defeating the present claim. It should be either allowed in full or not allowed at all;" and *Duthoit*, J., observed as follows: "It is clear that, not being *liquida causa*, the set-off could not be claimed under the provisions of S. 3 of the Code of Civil Procedure; and this being so, though I am prepared to allow that the set-off may be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, I do not see how, failing the provisions of S. 3 of the Civil Procedure Code, the defendants, who have paid no court fees on this account, can be allowed to recover a sum of money from the plaintiff." The same point was raised but not decided in 20 C. 527. The non-payment of court-fees is the only real difficulty; and if the requisite stamp duty is paid, there appears to be no reason whatever why the set-off should not be allowed to its full extent, so that in cases in which the set-off claimed exceeds the amount of the plaintiff's claim, the defendant will still be entitled to a decree for the balance as against the plaintiff. If this is not done, multiplicity of suits will be the only result and this evil should, of course, be guarded against. In *Hayatkha* v. *Abdulakha*, 6 B. H. C. R., A. C. J., 151, *Couch*, C. J., and *Warden*, J., held that a defendant may deny the plaintiff's claim and also plead a set-off and may obtain a decree for it, although no sum may be found to be due to the plaintiff. According to English Law, a counter-claim may be proceeded with, although the action of the plaintiff has been stayed or discontinued (order 21, *r*. 16); and where a counter-claim is established and a balance is shown in favor of the defendant, judgment may be given in his favour for such balance, or other relief may be given him (order 21, *r*. 17). Another point that has been decided is that the plaintiff in such a case is entitled to his costs (*Kishorchand* v. *Madhowji*, 4 B. 414). The English Law on this subject is thus summarised in the Encyclopædia of the Laws of England, vol. III, pp. 470—1: "Where a claim and counter-claim are both dismissed with costs, the plaintiff

(in the absence of any special direction) pays the general costs of the action, and the defendant pays only the additional costs occasioned by the counter-claim (*Saner* v. *Bilton*, 1879, 11 Ch. D. 416; *Mason* v. *Brentini*, 1880, 15 Ch. D. 287); and so, where both claim and counter-claim have been successful, the plaintiff will get the general costs of the action, though the result of the litigation as a whole may be in favor of the defendant; but the plaintiff, will not recover as costs of the action any costs which are fairly attributable to the counter-claim. (*In re Brown, Ward* v. *Morse*, 1883, 23 Ch. D, 377)."

P. DURAISWAMI AIYANGAR.

NOTES OF INDIAN CASES.

Durga Prasad Banerjee *v.* **Lalit Mohon Singh Roy,** I. L. R., 25 C., 86. It appears to us the decision in this case lays down a sounder rule than the decision of *Wier*, J., in *Narayana Devu* v. *Chath Venkataramayya*, 1. M. L. J., 332. S. 257-A provides that a sum paid in contravention of the provisions of the section shall be applied to the satisfaction of the judgment-debt. The question naturally arises, should it be so applied although the payment was brought to the notice of the Court many years afterwards or, does S. 258 say that the person paying the money should apply for satisfaction being entered *pro tanto* within the period limited by Art. 161 of the Limitation Act. A payment in persuance of an agreement of the nature mentioned in S. 257-A is mentioned in S. 258 as requiring to be certified. The nature referred to in the section merely appears to refer to the character of the agreement as giving time to the judgment-debtor, or as promising to pay something in excess and has no reference to the sanction which the Court is to give in order to render the agreement valid. It follows, therefore, that if an agreement under S. 257-A whether sanctioned or not by the Court falls within the scope of S. 258, when payment has been made in persuance of it, if such payment has not been certified, it cannot be recognized in execution.

Kali Kishore Deb Sarkar *v.* **Guru Prosad Sukul,** I. L. R., 25, C. 99. The decision in this case appears to us open to some doubt. There is, however, considerable authority in support of the view taken by the learned Judges; several decisions in Calcutta under the present and the earlier Codes and a case in Madras. The simple point is whether a question between a defaulting purchaser under S. 293 and the decree-holder seeking to recover the deficiency from him is one between the

parties to the suit or their representatives. We take it as a question relating to execution. For S. 293 expressly says that the procedure shall be according to the rules contained in the chapter for the execution of a decree for money. But that is not the whole point. Unless the question relating to execution is between the parties to the suit the order passed is not one under S. 244 and, therefore, not a decree. In *Amir Baksha Sahib* v. *Venkatachala Muduli*, I. L. R., 18 M., 439, *Shephard*, J., asks why if the Secretary of State executing an order for costs in a pauper suit be a party, should not the defaulting purchaser likewise be? But we deny the correctness of the premises and question the correctness of the decision holding the order relating to the Secretary of State's execution to be a decree. But assuming that a decree in favor of the Secretary of State for costs makes him a party, it does not necessarily follow that the defaulting purshaser is a party to the suit. The view of the Allahabad High Court in *Deoki Nandan Rai* v. *Tapesri Lal*, I. L. R., 14 A., 20, appears to us to lay down the correct rule.

We must confess, however, there is considerable force in the argument that the Full Bench decision in *Ram Dayal* v. *Ram Doss*, I. L. R., 1 A., 181, 188, passed upon the similar language of the old Code was left untouched by the Code of 1892.

Sarat Chandra Banerjee v. Bhupendra Nath Bosu, I. L. R., 25 C., 103. The decision in this case is an important one and appears to be perfectly sound. The executor of an Hindu will before the Hindu Will's Act came into force has not the estate vested in him so as to validate acts done by him with reference to the estate irrespective of the purpose or propriety of the acts. He has of course the powers of a manager under the Hindu Law. The idea of a will being foreign to the Hindu Law, and the conception of an executor entitled to deal with the estate at his will are equally foreign. His position, therefore, is one similar to that of a manager, the only analogy available in the Hindu Law.

Akikunnissa Bibee v. Roop Lal Das, I. L. R., 25 C., 133. The decision in this case raises a vexed question, as to whether an application for an order absolute under the Transfer of Property Act is one for execution of a decree. For purposes of limitation, it has been considered by the Allahabad High Court as one for execution. The learned Judges in this case follow the current of authority in the Calcutta High Court holding the application not to fall within S. 244, C. P. C. It is open to question whether the Allahabad view is correct. For an application to pass a decree is not an application to execute a decree. We are inclined to prefer the Calcutta view.

Kali Prosanno Ghose v. Rajani Kant Chatterjee, I. L. R., 25 C., 141. Now that the Legislature is said to be contemplating the revision of the Code of Civil Procedure, we would commend to its consideration the provisions regarding the finality of a decree upon an award. The careless language employed in S. 522 has led to an almost endless confusion of judicial decisions. Though we are disposed to think that the decision in this case lays down the right rule, it is difficult to deduce it from the language employed. The only question upon which the arbitrator's award should be final is its correctness upon the law or the facts. All other questions should be capable of being agitated in appeal. Whether the objection is one falling under S. 521 or is one which goes to the root of the award as that there was no submission or no award in law are matters which well form subjects for decision by a court of appeal. We think *Chief Justice Maclean* is putting it rather too high when he says that all the decisions quoted support his conclusion. Indeed the decision of *Subrahmania Iyer*, J., in the Full Bench Case, *Husanna* v. *Linganna*, I. L. R., 18 M., 423, is in favor of the view that the objections specified in Ss. 520 and 521 are not matters for appeal. We hope that definite and intelligible language will be employed in the re-drafting of the section.

Choa Lal Dass v. Anant Pershad Misser, I. L. R., 25 C., 233. We are glad that the power of the High Court to interfere at any stage of a criminal case in a subordinate court is clearly laid down. It is true that such interference ought to be exceptional and the principle laid down seems correct that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at its intermediate stage.

Mohendra Lall Mitter v. Anundo Coomar Mitter, I. L. R., 25 C. 236. The greatest possible confusion prevails as to what exactly the word *judgment* in cl. 15 of the Letters Patent means, so as to enable us to say when an appeal lies under that clause. In one case the Madras High Court went so far as to say that an order of adjournment in a suit was a judgment. This seems certainly not in accordance with the rule laid down in *DeSouza* v. *Coles* in 3 M. H. C. R. 384. The point received elaborate consideration in the *Justices of the Peace for Calcutta* v. *The Oriental Gas Company*, 8 B. L. R. 433. We have discussed the cases at length in a critical note in 2 M. L. J. 343. The decision in the case under notice that an appeal lies from an order refusing an application to commit for contempt of court does not seem to be quite free from doubt. The question as to what is a judgment has been raised in several English

cases under the Judicature Acts. But we presume they cannot settle the construction of the word in the charter.

The Secretary of State for India in Council *v.* **Rajlucki Debi,** I. L. R., 25 C., 239. Having regard to the punctuation, there seems to be no doubt that under S. 424 of the Civil Procedure Code, previous notice is necessary in an action against the Secretary of State. The words "in respect of an act purporting to be done by him in his official capacity" qualify merely "a public officer" and not "the Secretary of State for India." Even apart from the punctuation, it may be said that the action against the Secretary of State for India in Council must necessarily relate to his official capacity, unlike the case of a public officer who may be sued either for acts done by him in his public capacity or as a private individual.

A further question of importance is whether the action which requires previous notice is merely an action for damages for tort or for any relief in respect of an illegal act. It has been held in several cases where suits are brought against Municipal bodies or District Boards and previous notice is prescribed, such notice will be given only in cases where the action is for damages. There are many English cases also of the same description. There seems no warrant in the language of the Municipal Acts for restricting the notice to actions for damages. However that may be, we are unable to say that the learned Judges are wrong in declining to restrict the language of S. 424 to actions for damages.

Bhiku Khan *v.* **Zahuran,** I. L. R., 25 C., 291. We are disposed to prefer the decision of the learned Judges in this case to that of the Judges in the Allahabad case in *Queen-Empress* v. *Narain*, I. L. R., 9 A. 240. That decision has been dissented from by the Madras High Court in *Allapichai Ravuthar* v. *Mohidin Bibi*, *Ib.* 20 M. 3, and we think rightly. The defaulter is liable to as many months' imprisonment as the arrears will cover. The language of the Code in force when the case 6 M. H. C. R., Apx. 23, was decided was different. Having regard to the marked change in the language of the present Code, it is difficult to place the interpretation of the Allahabad Judges that the maximum period of imprisonment is only one month.

Enamul Huq *v.* **Ekramul Huq,** I. L. R., 25 C. 294. The point decided by *Sale*, J., in this case is one of some importance. Where an order for inspection has been made giving liberty to the plaintiff or his agent to inspect, the Court does not lose all control so as to be unable to

prevent the plaintiff employing any person he choses. Apart from authority, on principle it would seem to be right that the Court should have the discretion to prohibit the employment by the plaintiff of a person who was formerly in the service of the defendant in respect of the same business to assist in the inspection.

Prohlad Teor v. Kedar Nath Bose, I. L. R., 25 C., 302. It may seem a strange proposition to hold that a tenant by encroaching upon another land of his landlord becomes a tenant of that land likewise without the consent of the landlord; and yet Mr. Justice *Markby* appears to have given the weight of his authority to that proposition in *Gooroo Doss Roy* v. *Issur Chunder Bose*, 22 W. R., 246. If the encroachment is upon the land of third parties then that might be regarded as an addition to the holding and the tenant cannot claim the benefit of it for himself, but must pass it on to the landlord at the termination of the tenancy. But there is no warrant for the proposition that the tenant can defeat the landlord's claim to present possession by encroaching upon another land of his not included in the holding.

Bindubashini Dasi v. Harendra Lal Roy, I. L. R., 25 C. 305. The Privy Council held in *Dakhina Mohun Roy* v. *Saroda Mohan Roy*, I. L. R., 21 C., 142, following the decision of the House of Lords in the *Peruvian Guano Company* v. *Dreyfus Brothers & Co.*, 92 A. C., 166, that a payment of revenue by a successful claimant in possession was not a voluntary payment and was recoverable, though it was subsequently found that he was not entitled to possession. At the time of the payment he was in possession in good faith under a decree. In the case under notice, at the time of payment which we assume to have been *bona fide* made, there was no decision in his favor which would give him the interest which would justify the payment. But there was a claim made by him and that was being enquired into. The claim, no doubt, was ultimately found against. A slight extension of the principle of the Privy Council case would undoubtedly justify the decision. Although we are inclined to think that the claimant had no interest in the property at the date of payment, strictly speaking, it seems just to hold that in equity and good conscience he was entitled to recover.

Kali Pado Mukerjee v. Dino Nath Mukerjee, I. L. R., 25 C. 315. The decision in this case does not appear to us to be altogether free from difficulty. The Munsif's local jurisdiction was reduced, and a question as regards the jurisdiction to execute a decree in a suit which would not have been triable if the limitation as to jurisdiction had been in force at the date of the action by that Court, was raised.

The *Chief Justice* and *Banerjea*, J., are of opinion that the court which passed the decree not having ceased to exist is to have jurisdiction to execute it; and, therefore, the new Court having jurisdiction over the excluded area was not the Court to execute the decree. This is plausible enough. But suppose it was a decree for land unlike the case under notice where the jurisdiction depended upon the cause of action and the residence of the defendant and the jurisdiction of the court was cut down and the land fell within the jurisdiction of another court, can it be said that the court having ceased to have jurisdiction to try has jurisdiction to execute the decree? Supposing no new court was substituted for the excluded area, can it not be said that the court had ceased to exist for that area? Or suppose the pecuniary limit was cut down and the decree was for a larger amount, it seems it may be said with propriety that the court has ceased to exist or to have jurisdiction. The same reasoning would suggest that the execution in the case under notice was rightly had in the new court.

Radha Rani Dassi *v.* Brindabun Chundra Basack, I. L. R., 25 C., 320. A conditional order for a certificate of succession upon the appellants giving security was held not appealable under the Succession Certificate Act in *Bhagwani* v. *Manni Lal*, I. L. R., 13 A., 214. This case was followed by *Subrahmania Aiyar*, J., but dissented from upon a Letters Patent appeal by the *Chief Justice* and *Benson*, J., and in another case by another Division Bench, *Ariya Pillai* v. *Thangammal*, I. L. R., 20 M., 442. We think the Calcutta Judges have rightly refused to follow the Allahabad decision.

SUMMARY OF RECENT CASES.

Trade competition—Under-selling.

Ajello *v.* Worsley, [1898, I, Ch. 274, per *Stirling*, J.]

The plaintiff was the manufacturer of pianos of a particular type called the Brittania model type. The defendant, a retail dealer, advertised for sale of pianos of the plaintiff's manufacture at the same price at which the plaintiff was supplying the same to the trade, and he continued this advertisement even after he ceased to have in stock any pianos of the particular type and after the plaintiff had refused to supply him with the same. The result of this was that other dealers gave up their dealings with the plaintiff who immediately instituted an action asking for an injunction to restrain the defendant from issuing the advertisement. *Stirling*, J., before whom the case came on for disposal, *held*, that the

plaintiff had no cause of action, as, even supposing that the advertisement amounted to a misrepresentation that the defendant had pianos of the particular model in stock,—such misrepresentation was not the cause of damage to the plaintiff's trade.

The owner of any property is at liberty to sell or dispose of it for such consideration as he thinks fit and either at a profit or loss. The motives of the owner for so acting cannot be inquired into. Further, any person may sell or dispose of or offer for sale, any goods of which he is not possessed, but which he expects or hopes to acquire, and for any price he pleases and manufacturers have no right to complain that it in this respect affects their trade so long as they cannot trace the damage done to their trade to any fraud or misrepresentation practised on the public with respct to their goods.

Executor—Right of restrainer in specie.

In re **Gilbert**; *Exparte.* **Gilbert,** [1898, I, Q. B., 282,] per *Wright*, J.

G died insolvent, having by his will appointed his wife executrix of his will. His wife was one of his creditors and the debt due to her far exceeded his assets. The executrix proved the will and took possession of all the assets without converting them. Another creditor of her husband applied to her for particulars of the deceased's estate to which she replied by a letter in which she claimed to retain the whole estate for payment of her debt. Thereupon, the creditor presented a petition under the Bankruptcy Act, became the trustee in bankruptcy and took possession of the estate. In a suit by the executrix for recovery of possession, *held by Wright*, J., that as the debt due to the executrix far exceeded the value of the testator's assets, she was not bound to realise the assets, *i. e.*, convert them into money, before exercising her right of retainer, but was entitled to retain the assets in specie in satisfaction of her debt.

Income tax—Foreign principal.

Watson *v.* **Sandie and Hull,** [1898, I, Q. B., 326.]

The respondents were commission merchants carrying on business at Liverpool and they used to get consignments of goods for sale from a merchant in the United States. The respondents invoiced the goods to their purchasers in their own name guaranteed payment by their purchasers and remitted to their principals the proceeds of the sales less

their commission charges and expenses. On a claim by the crown against the foreign principals for payment of income tax :—

Held, that though as between the purchasers and the respondents there might be a presumption that the respondents were the vendors, there was no corresponding presumption as between the foreign principal and the respondents, that the property in the goods had passed from the principal to the agent and that, consequently, the sales by the respondents were as between them and the foreign principal made on behalf of the principal and that, consequently, the latter was liable to pay the tax claimed.

Practice—Misjoinder of causes of action.

Gower v. Couldridge and others, [1898, I, Q. B., 348, C. A.]

The plaintiff was a shareholder of a company of which the defendants were the directors. The plaint alleged a fradulent conspiracy by two of the defendants to promote a company to buy up a worthless business. As against the third defendant the plaint contained a statement of a statutory liability but he was not charged with being a party to the conspiracy. There was also a charge as against all the defendants of false and fradulent representation in the prospectus of the company. The suit was one for damages as against all the defendants :—

Held, (in the Court of Appeal) that the suit was bad for misjoinder of causes of action.

Sale of partnership assets—Goodwill.

Jennings v. Jennings, [1898, I. Ch. 378 per *Stirling, J.*]

The case of *Trego v. Hunt* (1896, A. C. 7) has established that where a person sells the goodwill of his business, he may set up a rival business, but he is not entitled to canvass the customers of the old firm, and may be restrained from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor or not to deal with the purchaser. This rule is only an application of the general principle that a man may not derogate from his own grant, —may not pocket the price and then recapture the subject of sale,— and arises out of the relation of vendor and purchaser. In the present case, A., the member of a partnership firm of A. and B. brought an actionagainst B, for rescission of the partnership on the ground of

misrepresentation by B. The action was, however, compromised on the terms that the partnership was to be dissolved, that A. was to get 1,200 £ and that B. was to retain the assets. The goodwill of the business was not specifically mentioned in the compromise. B., subsequently, brought an action for an injunction restraining A. from canvassing the customers of the old firm. Upon motion for an interlocutory injunction :—

Held, that, upon the facts above stated, the relationship of vendor and purchaser existed between A. and B., that the word *assets* was a compendious expression for the aggregate of the several items of property belonging to the partnership and that an agreement for the sale of such assets would in most cases have the same effect as if the several items of property were specifically mentioned including the goodwill and that, following *Trego* v. *Hunt*, B. was entitled to the injunction sought for.

Covenant running with the land—Private Residence.

Hobson *v.* **Tulloch**, [1898, I. Ch., 424. per. *Romer*, J.]

The plaintiff was the owner of two premises—"Runnymede" and "Whitefriars," both forming part of a purely residential estate and he conveyed the latter to J. S. subject to a covenant on the part of J. S. "not to use and occupy or permit to be used or occupied the said messuage or dwelling-house for the purpose of any trade or manufacture, or for any other purpose than a private residence." The defendant purchased the house in question from J. S. for the purpose of utilising it as a boarding house for scholars attending a school kept by him in the neighbourhood. Plaintiff sued for an injunction restraining the defendant from breaking the covenant :—

Held, (by *Romer*, J.) that the user converted the house from a private residence to the business of a boarding house and that the plaintiff was entitled to the injunction sought for.

Vendor and purchaser—"Default," meaning of—Delay in completion.

In re **Woods and Lewis'** *Contract*, [1898, I. Ch. 433 per *Romer*, *J.*]

The plaintiff had agreed to sell certain leasehold premises to the defendant and the sale was to have been completed on the 31st August 1897. The contract to sell contained a clause to the effect that "if from any cause whatever other than the *default* of the vendor the purchase

shall not have been completed on the 31st August, the purchaser shall pay to the vendor interest . . . until the completion of the purchase." On the delivery to the purchaser of the abstract of title, it appeared that there was a defect in the title which was immediately brought to the notice of the vendor who at once took steps to rectify the defect. The defect was not known to the vendor at the date of the contract, nor was the defect so obvious as to make ignorance on his part inexcusable or unreasonable. The defect was cured and the purchase completed only in November, 1897. The plaintiff claimed interest for the intervening period and the defendant refused on the ground that the delay was caused by the *default* of the plaintiff within the meaning of the terms of their contract; *Romer*, J., held that the delay in question was not due to the default of the vendor.

"*Default*," as defined by *Brown*, L. J. *In re Young and Harston's contract* (31 Ch. D. 168) "is a purely relative term just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction."

Construction of will—Absolute gift.

In re **Jones. Richards** *v.* **Jones,** [1898, I Ch. 438 per *Byrne*, J.]

It is an established rule of construction that, where a gift is made in terms to a person absolutely, that can only be reduced to a more limited interest by clear words cutting down the first estate. The rule though simple in the statement is very difficult in its application, and it is very doubtful whether *Byrne*, J., has properly applied the rule in the case before him. A testator by his will gave all his property to his wife "for her absolute use and benefit, so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate absolutely. After her death, as to such parts of my.........estate, as she shall not have sold or disposed of as aforesaid, subject to my wife's funeral expenses I give ....the same" in trust for sale for the benefit of other persons. The wife was appointed sole executrix. The wife took possession of the whole estate and at her death she disposed of it by her will. In a contest between the legatees of the husband's will and her own:—

Held, (by *Byrne*, J.) that the widow took an absolute interest in the estate and that it passed under her will.

Election—Recount of votes—Onus of proof.

Lord Monkswell and others v. Thompson, [1898, I. Q. B. 479.]

There were five seats vacant in the School Board of London for the Chelsea division. There were eight candidates who applied to be elected for the same. At an election held to fill up the vacancies, five of the candidates were duly elected according to the number of votes they had secured, the polling officer publishing their names in due course as elected. After this publication, a petition was presented by the candidate who was the sixth in the poll against the election of the person who stood fifth on the poll on the allegation that certain votes given in favour of the plaintiff were erroneously rejected or counted for the defendant or some other candidate by the returning officer and that by reason of such mistakes the result of the poll had not been duly ascertained and that, if the votes had been properly counted, he would have had a majority of lawful and valid votes. A recount was accordingly made of the votes given for the plaintiff and the defendant alone, and it was found that the petitioner had a clear majority over the defendant. The votes of the other candidates were not recounted. The defendant contended that what the plaintiff had done was not enough and that he must go a step further, have the votes of all the candidates recounted, inasmuch as it was probable that his votes had been wrongfully added to the other four candidates who had been declared elected by the polling officer. The petition of the plaintiff had not made the other four candidates parties, neither had the defendant taken any steps to bring them before the court within the time allowed by law for the purpose:—

Held, that the petitioner was entitled to the fifth seat, and that it was enough for him to establish that he had more votes than the defendant, and that it was unnecessary, so far as he was concerned, to recount the votes given for the other candidates.

Practice—Service of writ—Service according to contract.

Montgomery, Jones and Co. v. Liebenthal and Co., [1898, I Q. B. 487 C. A.]

The plaintiffs were corn merchants carrying on business at Liverpool and the defendants were merchants residing and carrying on business in Scotland. The defendants had agreed to sell a cargo of wheat to the plaintiffs, and that contract contained a stipulation that all

disputes arising out of the contract should be referred to two arbitrators, that any party to it shall for the purpose of such proceedings be deemed to be resident at the office of London Corn Trade Association and that service of proceedings upon a party residing or carrying on business in Scotland or Ireland, by leaving the same at the office of the London Corn Trade Association, together with the posting of a copy of such proceedings to the address in Scotland or Ireland shall be deemed good service, *i.e.*, good personal service. Disputes arose between the parties as to the non-delivery of the wheat in accordance with the contract and were referred to arbitration, and an award was made in favour of the plaintiffs. The plaintiffs issued a writ in execution to be served against the defendants within the jurisdiction and served it by delivering a copy thereof to the Secretary of the London Corn Trade Association at the office of the association in London and they also sent a copy of the writ by post to the defendants at their address in Leith. The defendants applied to the judge at chambers to set aside the service as being illegal:—

Held, that the service was proper and that generally the parties can, as regards the mode of service, contract themselves out of the rules of practice, and may appoint a person as agent to accept service, so long as they do not ask the court to do something which it is prohibited from doing under the rules.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications:—

The Albany Law Journal for May (*in exchange*).

The Calcutta Weekly Notes for May and June (*in exchange*).

The Allahabad Weekly Notes for May and June (*in exchange*).

The Green Bag for May and June (*in exchange*).

The Canadian Law Times for May (*in exchange*).

The Harvard Law Review for May and June (*in exchange*).

The Canada Law Journal for May (*in exchange*).

The Educational Review for May (*in exchange*).

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DE MINIMIS.—It is not often that an article by a law student receives judicial notice, and so the following, from *Farrington* v. *Putnam*;

90 Me. 405; 38 L. R. A. 339, will be read with curiosity on account of its condescension and the mild damnation of the student's views:—

"The complainants quote in their brief an article in the 'Harvard Law Review' (January, 1896), in which the writer, who was said at the argument by counsel for complainants to be a recent graduate of Harvard Law School, favors, upon the admittedly doubtful questions, the view taken in the *McGraw* Case, and not that adopted by the United States Supreme Court. But the writer makes no allusion to the fact that the opinion in his favorite case was based on certain stringent statutes of New York affecting the testamentary capacity of the testator to give, as well as upon the lack of ability in the donee to receive, while a different question was presented in *Jones* v. *Habersham*, 107 U. S. 174, 27 L. ed. 401, in which *Mr. Justice Gray* wrote the opinion. The writer also asserts that the latter case received but slight consideration at the hands of the Court, he evidently not being aware that the same case was first deliberately considered and decided by the Circuit Court, where *Bradley*, J., of the Supreme Court delivered the opinion, *Gray*, J., stating that fact in the first line of his own opinion":—*The Green Bag*.

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Extraordinary wills:—Cremation clauses are becoming quite common in English and Continental wills; but many of them are ignored by the relatives. Many testators now make some provision in their wills to ensure their not being buried alive. For instance, the late John Blount Price, of Islington, directed that four days after his death two skillful surgeons should be paid $ 25 each to perform such operation on his body as would kill him in case he were yet alive. The Viscount de Carros Lima directed that his body should be watched by his heirs until decomposition set in. A similar provision was made by an Irish gentleman, who died last year. A Vienna millionaire seemed to have a horror of darkness, for he provided not only that the vault in which his body was to be, should be lighted by electricity, but that the coffin also should be similarly illumined. Lord Newborough made provision for two separate interments.

One finds it difficult not to think harshly of the man recently deceased in this State, who in his will left his property to "the woman who lives with me," meaning by that his true and lawful wife. Not long ago a Boston man died, whose will left his wife penniless unless she married again within five years, the reason given for this proviso

being that he wanted somebody else to find out how hard it was to live with her—truly a monstrous revelation of post-mortem spite, and one that any decent court ought to set aside:—*The Green Bag.*

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A learned lawyer:—A lawyer of bland manners, who was better known for his faculty for getting business than for his conception of the bearings of an authority from the books, was one day arguing a motion before a very patient judge. He had quoted from four or five decisions and had said nothing that had any application to the case in hand. Pointing to a long row of volumes in calf binding on the table he exclaimed: "Your Honor, if these cases I have read to you are not just in point, I would have you know that I've got all these other ones here that are equally satisfactory!":—*The Green Bag.*

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A woman witness:—"Now," said the lawyer who was conducting the cross-examination, "will you please say how and where you first met this man?"

"I think," said the woman with the sharp nose, "that it was"—

"Never mind what you think," interrupted the lawyer. "We want facts here. We don't care what you think and haven't any time to waste in listening to what you think. Now please tell us where and when it was that you first met this man."

The witness made no reply.

"Come, come," urged the lawyer, "I demand an answer to my question."

Still no response from the witness.

"Your Honor," said the lawyer, turning to the court, "I think I am entitled to an answer to the question I have put."

"The witness will please answer the question," said the court.

"Can't," said the woman.

"Why not?"

"The court doesn't care to hear what I think, does it?"

"No."

"Then there's no use questioning me any further. I am not a lawyer. I can't talk without thinking."

So they called the next witness:—*The Green Bag.*

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A Judge cogitating audibly :—The story is told that a certain judge who, during the plea of a rather prosy lawyer, could not refrain from gently nodding his head in sleep, was caught at this by the lawyer, who looked significantly at him.

"Perhaps," said the judge, testily and prevaricatingly, "the counsel thinks the court was asleep, but he may be assured that the court was merely cogitating."

The lawyer talked on. Presently the judge, again overcome by his somnolency, noded off and aroused himself with a little sudden snorting snore.

"If it please your honor," said the lawyer, "I will suspend my plea until the court shall have ceased to cogitate audibly :—*The Green Bag.*

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Attaching a dead body for debt :—An interesting question has arisen in Pennsylvania in connection with the cremation of the remains of George W. Ferris, the inventor and constructor of the great Ferris wheel at the Chicago World's Fair. A statement in a Pittsburg paper, to the effect that the body of Mr. Ferris was being held in the crematory of Undertaker Sampson, in that city, for the unpaid funeral expenses contracted something over a year ago led the New York Sun to declare, with characteristic vigor, against what, it termed the pernicious practice of arresting or attaching the dead body of a human being upon any debt or demand whatever. It is a well-known principle of the common law that to seize a dead body on pretence of arrest for debt is *contra bones mores,* and an extortion on the relatives (4 East, 460). And in some States there are statutes declaring it to be a misdemeanor to attach or seize, under execution, a dead body (Cal. Penal. Code, § 295; Me. Rev. St., ch. 124, § 26; Mass. Pub. St. 207, § 46; R. I. Pub. St., § 3222). The law wisely places upon the next of kin the duty of providing decent burial of the body, the health and protection of society being the controlling consideration in such cases. As public policy demands the burial of decaying human remains, it would be manifestly improper, as well as dangerous, to allow the burial to await a settlement of the debt, no matter for what purpose it might have been incurred. The question arises, however: Is the holding of a dead body for debt a different thing from holding the incinerated remains of such body? In the case in point it appears that the undertaker properly performed his duty and reduced the mortal remains of Mr. Ferris to a few handfuls of ashes. His bill for such service not having been paid by the wife or other

relatives, the ashes continue to do duty as "collateral." In answer to the objection that to hold human remains as security for debt is none the less against public policy, although the inevitable reduction of the body to dust has been hastened by the purifying influence of fire, the Philadelphia Press remarks: "A principle or policy of law which is manifestly right when applied to a decaying and putrescent body is wholly inapplicable to innocuous and impershable ash. A crematory is a manufacturing establishment where corruption puts on incorruption and mortality is converted into a material which, if protected, will last indefinitely. It is hornbook law that a bailee for hire, who by his skill and labor imparts an additional value to the goods, has a lien upon the property for his reasonable charges. If the miller who converts a farmer's wheat into flour, or a tailor who makes a serviceable suit out of cloth brought to him, may retain the product until he is paid his charges, why may not the owner of a crematory have a lien for the value of his labor on the ashes which he has purged from everything that can pollute the atmosphere or in any way contaminate or harm the living?"

The Press, it cannot be denied, makes a very clever and ingenious argument in behalf of the alleged bailee in this case—the crematory company—but we have serious doubts whether the highest court in any of the States would be willing to give their assent to the proposition it lays down. It can hardly be claimed that the crematory company, in the case in point, is in any true sense a "bailee for hire." No one will, of course, deny that such a bailee, who receives chattles or materials to be repaired or manufactured, has a lien upon the property for his services; but it may well be doubted whether the reduction of a dead body to ashes imparts any additional value to the remains. The most serious objection, however, to the application of the principle of bailor and bailee to the case in point seems to us to be found in the necessity of classing human remains as commercial products. Such remains, in the nature of the case, can have no value other than a sentimental one, constituting, as they do, the last earthly remnants of the departed, and precious only as they recall to memory the intimate and tender relationships that once existed. To class such remains with wheat, corn, oats or other products of well known commercial value would be revolting in the extreme, doing violence to the most sacred of human relationships. It would be very easy for the crematory company to collect its charges in advance, before undertaking the process of reduction, but to give it a lien on the remains for its charges is something which we do not believe either the legislatures or the courts are yet prepared to assent to. This precise question has never been, so far as we are aware,

passed upon by the courts in this country. It ought to be:—*The Albany Law Journal.*

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English Criminal Evidence Bill:—The Criminal Evidence Bill has been introduced in the House of Lords by the Lord Chancellor, and its text has been published. The principal provision is that every person charged with an offence, and the wife or husband, as the case may be, of the person so charged shall be a competent witness at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. There are these provisos: (*a*) A person so charged shall not be called as a witness in pursuance of this Act without his consent. (*b*) The wife or husband of the person so charged shall not, save in this act mentioned, be called as a witness in pursuance of this act, without the consent of the person so charged. (*c*) Nothing in this act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during marriage. (*d*) A person charged and being a witness in pursuance of this act shall not have the right to refuse to answer any question on the ground that it would tend to criminate him as to the offence charged. (*e*) A person called as a witness in pursuance of this act shall not be asked, and if asked, shall not be required to answer, any question tending to show that any person charged has committed or been convicted of any offence other than that wherewith he is then charged, or is of bad character, unless (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) the person charged has asked question of the witnesses for the prosecution with the view to establish his good character or called witnesses to his good character, or otherwise has given evidence of good character; or (iii) the person charged and called as a witness has given evidence against any other person charged with the same offence.

2. (1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this act may be called as a witness without the consent of the person charged. (2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person:—*The Albany Law Journal.*

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Repartee On The Bench.—John Toler, Earl of Norbury, who was Chief Justice of the Court of Common Pleas in Ireland from 1800 till 1827, has the reputation of having, for many years, enlivened legal proceedings with brilliant drolleries. Here are some of Lord Norbury's *mots*, as collated by the Law Times :

Dr. Tory, the Roman Catholic archbishop of Dublin, was noted for his hospitalities. A Mr. Æneas MacDonnell was leaving the archbishop's house, where he had been dining, and as he went out, Lord Norbury, who was passing by with a friend observed him. "There goes the ancient warrior," he said. "What do you mean?" was the reply. "The pious Æneas returning from the sack of Troy."

Lord Norbury had a country neighbor whose cattle often roamed on his grounds, but when Lord Norbury's cows returned their visit he was immediately threatened with an action. "Forgive us our trespasses," he wrote somewhat irreverently, "as we forgive them that trespass against us."

On hearing, as he was walking down to court, that a crowd which he perceived on the quay near the Four Courts was gathered together from the circumstance of a tailor having been rescued from suicide by drowning. "What a fool," exclaimed the Chief Justice, "to leave his hot goose for a cold duck."

He was on one occasion riding with a friend named Spear, who was mounted on a fast-trotting horse. "You should," said the Chief Justice, "call that quadruped Shakespeare."

A gentleman having boasted in his presence of having shot seventy hares before breakfast, Lord Norbury caused a laugh by observing very drily, "I daresay *you fired at a wig.*"

An attorney having died in straitened circumstances, a collection was made for the payment of his funeral expenses. "How much will satisfy you?" said Norbury to one of the collectors. "A shilling will be sufficient," was the answer. "Well, here is a guinea; go and bury one-and-twenty of them."

Having sentenced a criminal to death in the usual form, he was surprised by the condemned man's exclamation, "A long day, my lord!" "You shall have it," was the reply; "this is the twentieth of June—to-morrow will be the longest day in the year."

On an action brought against a man named Paul, several letters of the defendant were put in evidence. The jury expressed a wish to see

them. "By all means," replied Lord Norbury. "Send up those 'Epistles of Paul.'"

Lord Norbury had a country house in Cabra, a suburb of Dublin, but few were ever entertained by him, though from the apparent heartiness of his invitations one would have believed him to be a most hospitable man. A story is told of an old gentleman and his wife having responded to the usual good-natured question, "When will you spend a few days with me?" by going to Lord Norbury's residence with bandboxes and portmanteaus. Lord Norbury, with great presence of mind, on seeing these preparations for their sojourn, came immediately to the hall door: "Now, my dear friends, this is so kind of you. I'll really take no excuse; you must positively oblige me by staying to dinner:"—*The Albany Law Journal.*

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Agency—Banks—Draft for Collection.—The plaintiff placed a draft for collection with a bank. The bank exercised reasonable care in the selection of sub-agents necessarily employed to do the work, and seasonably transmitted the draft through such sub-agents to the place of payment. *Held*, that on default of one of these sub-agents the bank was not liable to the plaintiff for the amount of the draft. *Irwin* v. *Reeves Pulley, Co.*, 43 N. E, Rep. 601 (Ind.); *State National Bank* v. *Thomas Mfg, Co.*, 42 S W., Rep. 1016 (Tex.).

There is much conflict of authority as to the liability of a bank to one who deposits with it a draft for collection in a distant place. In the federal courts, in New York, and in some other States, the bank is held to be an independent contractor, and so liable to the depositor for any default of its correspondents. *Exchange National Bank*, v. *Third National Bank*, 112 U S., 276; *Allen* v. *Merchants' Bank*, 22 Wend. 215. In other States the doctrine of the principal case prevails. *Dorchester Bank* v. *New England Bank*, 1 Cush. 177. The question is really one of fact, It would seem that from the nature of the case there is an implied authority for the appointment of sub-agents by the collecting bank. The latter is not expected to collect personally, and the better view seems to be that it ought not to be held to anything more than reasonable skill and ordinary diligence in the selection of its correspondents. Mechem on Agency, § 514:—*Harvard Law Review.*

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Contracts—Implied Promise to Pay for Services.—The plaintiff performed work for the defendant, at the latter's request. At the time

the plaintiff intended to make no charge, as he expected to receive employment from the defendant. The defendant did not know of the plaintiff's intention, but had made no agreement to pay. *Held,* the plaintiff could recover the value of his services. *Thomas* v. *Thomasville Shooting Club*, 28 S. E., Rep. 293 (N. C.).

If both parties understood that the services were to be gratuitous, of course the plaintiff could not recover. No legal obligation would be created by the performance of work which was intended and received as a gift. *Osborn* v. *Guy's Hospital*, 2 Str. 728; *Collyer* v. *Collyer*, 113 N. Y., 442. But in the absence of agreement or special relations between the parties, when one person does work for another, at the latter's request, there is an implied promise to pay for it. A secret intention to make no charge does not make a gratuity of that which would otherwise create a legal obligation. At most, such intention only shows that, under certain circumstances, the one who did not work was willing to waive a legal right which he might enforce if he desired. *Baxter* v. *Gray*, 4 Scott N. R., 374; Keener, Quasi-Contracts, 315 *et seq.* :—*Harvard Law Review.*

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Contracts—Specific Performance—Statute of Frauds—A and B entered into an oral contract as to certain land. B alone signed a memorandum sufficient to satisfy the Statute of Frauds. *Held,* that A was entitled to specific performance, for by bringing the suit, plaintiff, in writing, consents to the contract and makes the remedy as well as the obligation mutual. *Central Land, Co.* v. *Johnston*, 28 S. E., Rep. 175 (Va.).

The case is interesting as overruling *Wood* v. *Dickey*, 90 Va. 160, which seems to be the only decision *contra* in any court, although some of the earlier cases contain *dicta* to the same effect. The decisions are usually put on the ground that plaintiff, by bringing the action, makes the remedy mutual. A better reason would appear to be that the memorandum on plaintiff's part can be made at any time, and the bill itself may be regarded as one. This is suggested in Story, Eq. Jur. § 755, and adopted as the proper ground in Browne, St. Frauds, § 366, where the authorities are collected :—*Harvard Law Review.*

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Contracts—Stranger to the Consideration—Sole Beneficiary.—The declaration alleged that defendant offered the services of his stud-horse for a certain sum, and further agreed to pay $ 750 to the owner of the

first of the foals of said stallion that should trot a mile in two minutes and thirty seconds. One P bred his mare to this stallion, and sold the foal to plaintiff to whom, on performance of the condition, defendant refused to pay the $ 750. On demurrer, it was *held* that the declaration stated a cause of action. *Whitehead* v. *Burgess*, 38 Atl. Rep. 802 (N. J.).

The court construed the contract to mean that the money was to be paid to the person who should own the colt at the time it should trot the mile. Perhaps a more natural construction would be that the money was to be paid to the owner of the dam, in which case the contingent right of action would be impliedly assigned by the sale of the colt. On the construction adopted by the court, the plaintiff was clearly a sole beneficiary though a stranger to the consideration. Earlier cases in New Jersey establish the doctrine of *Lawrence* v. *Fox*, 20 N. Y. 268, that a third party may sue at law on a contract made for his benefit, provided the promise looks to the satisfaction of a valuable claim of the third person against the promisee. *Laing* v. *Lee*, 20 N. J. Law, 337; *Joslin* v. *New Jersey Car Spring Co.*, 36 N. J. Law, 141. The New York courts, resting the doctrine on the principle of subrogation, refuse to extend it to actions brought by a sole beneficiary. *Buchanan* v. *Tilden*, 39 N. Y. Supp, 228. In the present case this distinction was not taken, the court treating, *Joslin* v. *New Jersey Car Spring Co.*, *supra*, as necessarily controlling the question to be decided. There appears to be no other case in New Jersey according a right of action to a sole beneficiary :—*Harvard Law Review.*

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Property—Reigistry of Deeds—Notice.—A sold land to B, and later to C, who recorded his deed first. After B's deed was on record, C mortgaged the land for value to D, who was ignorant of B's claim. D then recorded. *Held*, that D's title would prevail over B's, if C bought without notice of the previous deed to B, otherwise not. *Parrish* v. *Mahany*, 73 N. W. Rep. 97 (S. D.).

The South Dakota statute makes every deed of land void against a later *bona fide* purchaser for value whose deed is first recorded. Taking this literally, C would be protected and could pass good title, if he bought in good faith; but if not, he would not be protected, nor would D, since the latter's deed was not first recorded. The decision might have been put on this narrow, perhaps too narrow, construction of the statute. The court, however, goes on the ground that D, having constructive notice of the earlier deed to B, must at his peril ascertain if C bought *bona fide*. This is begging the question, as it is much disputed

whether a grantee has notice of any deeds by a grantor under whom he claims, if recorded after the deed by that grantor which is in the grantee's chain of title. *Conn.* v. *Bradish*, 14 Mass. 296; *Morse* v. *Curtis*, 140 Mass. 112; *Fallass* v. *Pierce*, 30 Wis. 443; *Woods* v. *Garnett*, 72 Miss. 78. Another branch of the same general question was touched on in the discussion of *Bennett* v. *Davis*, 38 Atl. Rep. 372, in 11 HARVARD LAW REVIEW, 344 :—*Harvard Law Review.*

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Property—Tenant at Will—Notice to Quit.—The plaintiff was A's tenant at will. A conveyed the premises to B, and B received rent from the plaintiff. B afterward leased part of the premises to C, and the plaintiff was forcibly ejected by the defendant, C's servant, without notice to quit. *Held*, the plaintiff's tenancy was terminated by the lease, and he could not maintain trespass *quare clausum.* *Seavey* v. *Cloudman*, 38 Atl. Rep. 540 (Me.).

Upon payment of rent to B, the plaintiff became B's tenant at will. *Anderson* v. *Prindle*, 23 Wend. 616. So the question for the court was whether a landlord could terminate a tenancy at will by a lease of part of the premises, without giving the statutory notice to quit. The result reached, that the statute did not apply to the present case, and that the tenancy was terminated by the lease without notice, seems to be in harmony with previous decisions in Maine and Massachusetts. It has been held that a tenancy at will is terminated without notice to quit when the landlord conveys the premises: *McFarland* v. *Chase*, 7 Gray, 462; *Robinson* v. *Deering*, 56 Me. 357; even if the conveyance is merely colorable; *Curtis* v. *Galvin*; I Allen, 215; so, too, when the landlord leases the whole premises: *Pratt* v. *Farrar*, to Allen, 519. The principal case provides one more way of escaping the requirements of the statute. As a result, there seems to be but little vitality left in the statute, and the estate of a tenant at will is as precarious as it was at common law :—*Harvard Law Review.*

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Sales—Delivery—Second Vendee.—Apples were sold to the plaintiff but left in the possession of the vendor, who afterwards sold and delivered them to the defendant, an innocent purchaser. *Held*, the defendant was not guilty of conversion. *Cummings* v. *Gilman*, 38 Atl. Rep. 538 (Me.).

After the first sale the vendor is bailee and the vendee bailor of the chattel. Whatever may be the right of the bailor's assignee (10

HARVARD LAW REVIEW, 57), it is well settled that the bailor may maintain trover against the purchaser from the bailee. 2 Notes to Saunders, 91, note, b. The defence to such an action must rest on the ground that the vendee has been guilty of fraud in allowing the chattel to remain in the hands of the vendor and is, therefore, estopped from denying that the latter is his agent for sale. *Jewett* v. *Lincoln*, 14 Me. 116. The vendee should have a reasonable time to take possession. *Ingraham* v. *Wheeler*, 6 Conn. 277, 284; *Kleinschm dt* v. *McAndrews*, 117 U. S. 282. *Lanfear* v. *Sumner*, 17 Mass. 110, seems to be the only case where a recovery has been refused unless fraud was shown, but this case has been severely and apparently justly criticised. *Ricker* v. *Cross*, 5 N. H. 570; *Meade* v. *Smith*, 16 Conn. 346, 365; *Taylor* v. *Boardman*, 25 Vt. 581:—*Harvard Law Review*.

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A Master of Irish Legal repartee.

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We have narrated in a former article some of the passages at arms between Curran and the bench during his earlier years at the bar. When he attained an indubitable position as a leader he did not hesitate to rebuke a Chief Justice and a Lord Chancellor. He was addressing a jury in one of the state trials in 1803 with his usual animation. Lord Norbury, the Chief Justice of the Common Pleas, who was presiding, had an evil reputation as "a hanging judge." Curran observed that the Chief Justice shook his head in doubt or denial of one of his arguments. He paused and looked straight at the Chief Justice. "I see, the gentleman," he said, "I see the motion of his lordship's head: common observers might imagine that it expressed a difference of opinion, but they would be mistaken—it is merely accidental—believe me, gentlemen, if you remain here many days you will yourselves perceive that when his lordship *shakes his head* there's *nothing in it*." Between John Fitz-Gibbon, Earl of Clare, the Irish Chancellor, and Curran there was a deep-seated hatred extending over the greater part of their careers. Fitz Gibbon had fought, when he was Attorney-General, a duel with Curran in a quarrel arising out of a scene between them in the Irish House of Commons. Curran said that Fitz Gibbon on that occasion took deliberate aim at his heart, and he has stated that Fitz Gibbon's hostility, which drove him out of practice in the Court of Chancery, entailed on him a loss of at least £30,000. One day, when it was known that Curran was to make an elaborate argument in Chancery, the Chancellor brought a large Newfoundland dog with him upon the bench, and, during the

progress of the argument, he lent his ear much more to the dog than to counsel, and at length began ostentatiously to fondle the animal. Curran stopped at once. "Go on, go on, Mr. Curran," said the Chancellor. "Oh, I beg a thousand pardons, my lord. I really took it for granted that your lordship was employed in consultation."

Curran and Egan fought a duel, owing to some temporary estrangement. The meeting was, however, bloodless. Egan complained bitterly that the disparity of their sizes gave Curran an advantage. "I might as well fire at a razor's edge as at him," said Egan, "and he may hit me as easily as a turf stack." "I wish, Mr. Egan," said Curran, "to take no advantage whatever of you. Let my size be chalked upon your side, and I am quite content that every shot which hits outside that mark should go for nothing:"—*The Albany Law Journal.*

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Justice Brewer on "the Nations Anchor."—We take the liberty of extracting the following address of Mr. Justice David J. Brewer, of the Supreme Court of the United States, at the Lincoln birthday celebration by the Marquette Club of Chicago, on the suggestive subject, "The Nation's Anchor"—meaning, of course, the great tribunal of which he is a member—from *The Albany Law Jurnal.* Justice Brewer spoke as follows:

"*Mr. Chairman and Gentleman of the Marquette Club:* This is the most cosmopolitan city on the face of the globe. Every citizen of Chicago admits the fact. Within its limits all ages of history are repeated, all nations and races are represented. Nothing of sight, sound or smell has been known in time or space but has here its counterpart. Who has not heard of Babel, with its dissonant voices and its confusion of tongues? But babel was only a kindergarten in languages compared with Chicago. The sense of smell is never disappointed. Germany may boast of her many-scented city of Cologne; but as the proud dweller by the stream which courses through your midst sniffs the evening breeze he challenges the world for a larger variety or a greater intensity of smell. And with a prodigality of enormous wealth and a charity tempered by wisdom, you do not propose to appropriate all this fragrance to yourselves or to waste it on the desert air, but to distribute it freely among the dwellers by the banks of the Illinois and in the upper Mississippi Valley.

"The wandering Jew finds here a home, and establishes himself in magnificence surpassing of Solomon in all his glory, having around him.

all that monarch possessed, save 999 of his 1,000 wives, and, thanks to the capacity of the Chicago divorce courts, may have even a thousand wives, provided he will take them consecutively and not contemporaneously.

Two Pits and Corners.

"The ancient Joseph was thrown by his brothers into a pit, only to emerge therefrom as a successful speculator in Egyptian grain, but the Chicago Joseph throws everybody in your pit and puts up a corner in wheat so immense as to make even a mummied Pharaoh groan with envy.

"I heard the Chief Justice of the United States, himself a citizen of this 'no mean city,' exultingly declare that Chicago had within its limits more Poles than any city in Poland, more Bohemians than any city in Bohemia, more Germans than any city in Germany save Berlin, more Irish than any city in Ireland except Dublin, more Italians than any city in Italy save Naples and Rome. And then I ventured to add, as a suitable climax, doubtless more saints and sinners than any places in the universe save heaven and hell. The Chief Justice promptly admitted the charge as to the saints, but evidently thought that New York might be a successful rival in the matter of sinners. The air of sanctity which fills this room sufficiently attests from which class of your people this gathering has been summoned.

"In this cosmopolitan character and in the heterogeneous elements of its population, Chicago but typifies the nation, of which it is the great central city. This is the one land towards which all nations move, and within whose borders every race save the 'heathen Chinee' finds welcome and a home. John on Patmos doubtless had no apocalyptic vision of America, although he pictures it when he spoke of that 'great multitude, which no man could number, of all nations, and kindreds, and people, and tongues.' It is the genius and mission of our country to take these heterogeneous elements, these fragments of varied and ofttimes antagonistic races, and weld and fuse them into one homogeneous people, whose great achievements shall be equal rights and universal liberty.

Wisdom of the Fathers.

"Is this achievement within the reach of man? Yes, thank God, it is; made so by the grand conception of a written Consitutation and a permanent and independent judiciary. The fathers may not have foreseen the marvelous mingling of all races within our borders which the

century has accomplished, and yet if they had foreseen it they could not have devised a wiser system of government than that which placed in organic laws limitations upon the powers which a majority may exercise, and created a tribunal separate from the law-making body to determine at the instance of any citizen whether those limitations have been passed. Power to make a law, and at the same time to declare that that law does not transcend any constitutional limitations is equivalent to power to ignore those limitations whenever a temporary exigency may demand.

"It is true that in Great Britain liberty abides without any written constitution. There is no organic instrument which the people have lifted up above their representatives, beyond whose terms and limitations those representatives may not go. The will of the people, be it ever so changing, is, as expressed from day to day in the legislative enactments of Parliament, the supreme and incontestable law. If, as one of the English judges said to a friend, 'Parliament should enact that Lord Salisbury might without compensation take possession of Hawarden Castle, and oust therefrom its present proprietor, William E. Gladstone, the courts would be bound to enforce that as the law of the land.'

"But parliament never does such a foolish and unrighteous thing; and why? Because of the checks and counter-checks in her legislative system growing out of the essentially different characteristics of her two legislative bodies, because of the conservative natures of the single homogeneous race—the Anglo-Saxon—which fills the land and controls the government, and because of the limited suffrage which restricts the power to the more conservative of even that race. By reason of these three facts, despite the monarchical form of government, despite the absence of any constitutional restraints, liberty finds a stable abiding place in the English Isles.

"In this country the legislative bodies of the nation, though differently selected, represent the voters. We have universal suffrage and a population as heterogeneous as the different races of the world will permit. An unrestricted and absolute legislative freedom would certainly sweep on to despotism of the mob, whose despotism is always followed by the man on horseback.

People v. Rabble.

"Let no one misunderstand me or impute an intent to assert that our institutions are perfect. The order which reigns in Warsaw is not the great end of political existence. ...True, I do not stop to discuss what changes, social and political, ought to be made. I concede that

many are necessary, made so by the rapidly varying conditions of life, and very likely to become more imperative in the days to come. Those changes may be radical and far-reaching, and I am glad to note that the best and most earnest thought is being given to the consideration of what ought to be done. All I insist upon is that they shall be wrought out by the deliberate action of the whole people in the appointed way, and not foisted upon us by any crowd that may happen to gather at the street corner.

"We see too often the spectacle of some local and limited gathering of individuals, some association or organization, meeting and, like the three tailors of Tooley street, resolving, 'We, the people,' forgetful of the facts that seventy millions of people have freighted their all of earth in this, our goodly ship of state, and that they have the supreme right to say that no mere handful shall lower a single sail or take the rudder from the hands of the select pilots. Whatever is to be accomplished in the way of change shall not be by the South American habit of revolution, but by the North American process of evolution.

"If against some local movement some effort of a few, the Supreme Court calmly lifts its staying hand and says, 'Thus reads the Constitution,' let no man haste to destroy that court or weaken its power in order that the restraints of the Constitution may be safely ignored, but let the people proceed in the appointed way to change or remove any restraints in that instrument which they believe stand in the way of a better social and political life.

"*Government by Injunction.*"

"No one can be blind to the fact that there is to-day in the land a movement to displace the courts. It is part and parcel of the scheme to array the many against the few, the masses against the classes, and this is done under the pretence of realizing a more complete government by the people. The leaders are to adroit to propose their total abolition. The cry is to shear them of jurisdiction and leave them like painted ships on a painted ocean. The shibboleth of this movement is 'government by injunction,' and in support of the claim that there is danger of liberty from the action of courts, great names are invoked, even the name of him whom we honor to-night. They quote his declaration that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by a decision of the Supreme Court, the people will cease to be their own masters, ignoring that in the same great message he declared that the

dicisions of that court in any case must be binding upon all the parties thereto; that it was a duty from which judges could not shrink to decide all cases properly brought before them, and that it was no fault of theirs if such decisions were turned aside to political purposes.

"I am as much opposed to government by judges as any man. They are no more qualified to exercise the functions of government than the clergy, and a theocratic government was long since proved a failure. But the writ of injunction is not an act of legislation. It creates no new law. It only enforces rights which the Constitution and the law have, theretofore, declared sacred. It is as old as the struggle of the English-speaking people for liberty, and it has been used to protect and not to govern.

"The only distinguishing feature of it in the practice of to-day is one necessarily growing out of the great combination of men and capital. It is sometimes applied for against many instead of against a single individual. Do numbers change rights? If one man trepasses on my property, and I may have injunction to restrain him, is my right to protection any the less clear because a thousand join in the trespass? The commom sense of every one thunders an answer in the negative and affirms that there is nothing more despicable in any idea of justice than an effort to measure it by numbers of votes or wealth. The great strike of which this city was the historic centre attests the wisdom of judicial interference. As one of the leaders in it declared, 'It was not the soldiers that ended the strike, it was not the old brotherhoods that ended the strike, it was simply the United States courts that ended the strike.'

True Glory of the Strike.

"And to the great honor of the men who were engaged in it, be it said that while they yielded not to any show of force, they did yield to the decisions of the lawfully constituted tribunals of the nation. The peaceful ending of that strike is a supreme attestation of the power of the American people to govern themselves. That honest and true-minded men were on both sides of that controversy no sensible man doubts, and that it was settled judicially and not by bayonets and bullets is the glory of all. And here let me say in passing that the hero of that struggle for the domination of law was Circuit Judge William A. Woods, whose name will be revered and honored through the coming ages long after the memories of his critics and assailants shall have become like the body of Lazarus four days in the grave.

"It is not part of the functions of a judge to govern, and notwithstanding the talk about government by injunction, there has never been

any attempt by courts to exercise the function of government. That it was the understanding and purpose of the framers of the Federal Constitution that the judiciary should exercise the power of determining whether any given statute conflicts with the fundamental law was affirmed early in the history of the court in a vigorous opinion of the great chief justice, and has been affirmed and reaffirmed again and again since, and has been and is the general understanding. That such is the true interpretation of the Constitution is evident from the fact that there has never been any serious effort for a change. That the judiciary might never usurp the functions of government and attempt to legislate, it was given no power over the purse or sword of the nation. It can neither itself legislate nor compel congress to legislate. It can take no money out of the public treasury, neither can it direct the movement of the army of the nation. It has to depend on congress for the means of its existence, and appeal to the executive for the enforcing of its judgments.

Tribute to Supreme Court.

"And now how during the century of the national life has the Supreme Court discharged the solemn duties imposed upon it? That it has made mistakes is undoubted. No sensible man off or on the bench ascribes to it infallibility. I certainly should be the last to believe it infallible. I know it is often wrong—it frequently overrules me. And yet, notwithstanding its mistakes, that in the past at least (for of the present it is not fitting that I should speak) it has proved worthy of its high trust, the common judgment of thoughtful men the world over affirms. Better, far better, to suffer the injuries which come from its occasional mistakes than the marvelous wrong which would flow from the attempt to settle all questions of right and wrong of power or the lack of power, by the mere matter of numbers or the accumulation of majorities.

"It has been well said that in an early day John Marshall took the Constitution, penned by the marvelous genius of Madison and Hamilton, and stamped upon it in large and luminous letters the single word 'Nation.' That word is to-day the great interpreter of our Magna Charta. True, to make it indelible cost a war, but the martyr blood of him whose birth we this evening commemorate transcribed it from written instruments to loving hearts and into the life this republic, and now so long as the United States endures—

"O'er all this land one flag shall float,
One song ascend from every throat,
That flag the banner of the free,
That song the song of liberty.

Source of Present Strain.

"No one can fail to discern that the great strain through which this nation is now to pass in its political and judicial life springs not from the conflicting relations of the national government to the States. Those have been settled by the war. The strain will come from the fact of our rapidly increasing population, and the struggle to throw off all constitutional guarantees of protection to liberty and property as more restraints on the so-called liberty of the many. In the presence of this strain I invoke the thoughtful attention of every man to the oath which each justice of the Supreme Court must take:

"'I, ———, do solemnly swear that I will administer justice without respect to persons and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as justice of the Supreme Court according to the best of my abilities and understanding, agreeable to the constitution and laws of the United States. So help me God.

"God forbid that any man elevated to a position on that bench should ever prove recreant to the solemn obligations of that oath, taken on earth, but recorded in heaven.

"It is a curious anomaly of the present day that from some in this land we hear the feverish cry of 'Down with the courts and let the will of the temporary and shifting majorities settle all questions of power and right,' while at the same time from others come an earnest call for the adjustment of disputes between nations through the peaceful processes of arbitration. Courts for disputes between nations, but no courts for disputes between the government and individauls—between the majority and the minority. These dissonant voices only accentuate the fact that within our heterogeneous body politic there are depths as well as heights.

Criticism of Supreme Court.

"It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death.

"I remember seeing in an eastern paper immediatly after the decision in the well-known income tax case a most extravagant eulogy upon the Supreme Court as the great defender of the rights of the few States against the many, and of the accumulation of proverty against

unconstitutional assaults. And when thereafter by that court the act of congress denouncing all contracts, combinations and conspiracies in restraint of trade was held applicable to a combination between railroads to prevent competition in rates, that same paper contained an article expressing the most extraordinary surprise that men supposed to be of ordinary intelligence could be guilty of such a stupid blunder.

"The one article could be condensed in a single clause, 'A Daniel come to judgment; yea a Daniel!' and the other in the equally short and expressive pharse, 'An ass within a lion's skin.' Now, it is the inalienable right of every American citizen, according to the peculiar construction of his organs of hearing, to recognize in the judgments of that court either the voice of a Daniel or the braying of an ass.

Confidence in the People.

"It is often said that the courts act as though they had no confidence in the people. But surely that is grievous misunderstanding of the truth. On the contrary, they have the most abounding confidence. They believe that when the people framed the organic law they meant that it should be the measure of all rights and the limitations of all powers, and when they intrusted to the courts the duty of determining whether any single act conflicts with that organic law they meant that those courts should discharge that duty in the fear of God and according to their unbiased and deliberate judgment. They have abundant confidence that the people will honor them for their loyalty to this duty in the face of all opposition and denunciation, and he in the long run will alone receive honor at their hands who in every time of question and excitement stands firm by his convictions.

"A judge is not indifferent to popular approval, but it is that approval which comes at the last, and not at the first thought. Never was there a grander judicial utterance than that which fell from the lips of Lord Mansfield as an excited populace surged up against the gates of Westminister demanding a judgment according to their notions. 'I wish popularity, but it is that popularity, but it is that popularity which follows, and not that which is run after. It is that popularity which sooner or later never fails to do justice to the persuit of noble ends by noble means.' And to-day, despite all tumultuous and passionate cries, it is as certain as holy writ that that judge will be forgotten who simply bends the eager ear to catch the rumbling of the popular voice, while the immortal laurel waits for him who has the unfailing courage of his convictions, and who fearlessly asks only the single questions, What saith the Constitution?

Blessing or Clamor.

"Do not be discouraged. Let not the noise and confusion which prevail in the low lands of our political life alarm you. We are a

garrulous people. In the valleys is the endless gabble of the demagogue, the cry and tumult of temporary passion. It is not portentous of evil, but, on the contrary, prophetic of good. Let every individual thrust into the seething mass of public opinion his own views of what ought and what ought not to be done. Let the clamor go on. It is a blessed thing—blessed in every direction. It relieves the blatant whose stomach is always full of wind, and the great public discussion will surely separate the wheat from the chaff, sift the wisdom from the folly and finally work out that which is best for all.

"I have abiding faith in the judgment of the American people. Above the valleys of political clamor and noisy strife I see rising in unchanging stability the rock-ribbed mountain peaks of calm, deliberate judgment. And so sure as the mountains endure, so sure will the sober second thought prevail. The confusion of tongues will some day end. The speech at Gettysburg will remain an undying prophecy: 'Government of the people, by the people, and for the people shall never perish from the earth.'

Democracy and Niagara.

"That grim and cynic Scot, Thomas Carlyle looking at the tumultuous movements which so often sweep through this land of government by the people and of the people sneeringly remarked that democracy was shooting Niagara. He saw in those movements only a flood which was sweeping law and order and the foundations of society onward to the brink of a destroying precipice. But Niagara presents two visions: You stand on the bank and you see an angry flood sweeping onward, and bearing everything on its bosom to the fearful and fatal jump. It is emblematic and symbolic of destruction. You turn your eye in the other direction and you see that mighty flood subdued by the hand of man to the dominion of law, and its awful energies transmuted into electric force, which is borne to the neighboring cities, giving them ceaseless light and regulated power.

"So it is with the tempestuous democratic flood. Unrestrained, unchecked, it will sweep onward, bearing all thing to certain destruction; but subjected to restraining law, its tremendous and irresistible force will be transmitted into beneficent light and power to illumine the upward ways of humanity, and strengthen every effort for the bringing in of that millenial day when peace and prosperity shall enfold the earth with glory."

REVIEWS.

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INLAND WATER-COURSES.

Disputes are very frequent as to water-courses, as the origin of the word 'rivals' in the English language indicates. Yet, in India, there has till now been no legislative enactment defining the rights of owners in water flowing through their land, nor have judicial decisions gone far in defining these rights. The Easements Act of 1882 (which is applicable only to Madras, Central Provinces and Coorg) provides, indeed, for the creation, transfer and extinction of easements which are more or less restrictions of natural rights, but as to what these rights are in flowing waters, the legislature is silent. The illustrations to some of the sections of the Act no doubt throw some sidelight on the question, but for the body of the law we have still to look to English decisions.

2. According to English law, water-courses are divided into two classes—*natural* and *artificial*. The former are again divided into *tidal navigable* and *private*. It is proposed to define these with some precision.

A *water-course* consists of bed, banks and water. The bed is covered by the water and contains the water at its fullest when it does not overflow its banks, *i.e.*, it forms the soil below the high water-mark either of the ordinary tides or of the ordinary floods. The *bank* is consequently the outermost part of the bed in which the river naturally flows. The *water* covers the bed, and the one cannot be owned without touching the other. A water-course, in order that it may be the subject of riparian or other rights, must have a defined course, *i.e.*, it must flow in a fixed direction and by a regular channel with banks or sides. Those occasional outbursts of water, which in times of freshet, or melting of ice and snow, descend from the tops of hills and flood the country round, are not

water-courses. On the other hand, it is not necessary that they should flow continuously. In the words of Bartlett, J., "It is not essential to a water-course, that the banks should be absolutely unchangeable, the flow constant, the size uniform, or the water entirely unmixed with earth or flowing with any fixed velocity; but the law does not and cannot fix the limits of variation in these particulars."—*Rassett v. Salisbury Manuf. Co.*, 43 *N. H.*, 569, 578. In other words, the decision of the question, whether a certain stream is a water-course or not, will depend upon the circumstances of each case.

The passage last quoted shows that current is also a material requisite of a water-course; but this alone will not convert a lake into a river; for instance, there are lakes in which there exist currents in the surface water flowing from a higher to a lower level, and discharging into a river or marsh; but these are not water-courses.

3. A *natural* water-course may be defined as a body of water issuing *ex jure naturæ* from the earth, and by the same law pursuing a certain direction in a defined channel till it forms a confluence with the sea, or joins another body of water or flows into a lake or marsh. It matters not whether the water flows and reflows, or has its current only one way. Rights attach to a water-course at its very source,* *i.e.*, the point where the waters rise to the surface; so, the interception of water at its very source by the person on whose land the spring rises is as much actionable as any other diversion of the water lower down.(a) The point of termination is not very material for legal purposes. It is generally the place where the waters mingle with the sea or other body of water.

Underground channels that run in a known and defined course stand on precisely the same footing as surface channels.†

* From an examination of the cases, it would appear that the source is the point where the water begins to flow in well-defined channel where such channel does not begin at the very springhead.

(a) *Dudden* v. *The Guardians of Chetten-Union*, 11 Ex. 627.

† A natural stream is defined in the Indian Easements Act, as "a stream whether permanent or intermittent, tidal or tideless on the surface of land or *under ground*, which flows by operation of nature only in a natural and known course."

But in all cases, whether the water is flowing above ground or underground, it is essential that it should flow in a defined course: else, no action can be maintained in respect of it.

4. As already stated, a natural water-course may be either *tidal navigable* * or *private*. The distinction is one of some importance as it affects the rights of private individuals in the bed of the stream and their right to fishing. A *tidal navigable* water-course is one which is actually navigable, and in which the tide ebbs and flows. The line of demarcation of the common law between these two classes appears to be that at which the streams partake of the sea. The presence or absence of salt water is not, however, the criterion; the border line appears to be the place where a regular rise and fall under the influence of the tide becomes perceptible. (*Rice* v. *Miller*, 8 Q. B. D., 626.) The public may acquire a right to navigate in non-tidal, but navigable streams. Such a right will be in the nature of an easement.

According to Roman Law, all perennial rivers were *public* rivers, not in the sense that the ownership of the bed in the soil belonged to the State, but in the sense that they were intended for the use of the public, or in other words, they were subjected by the law to a kind of servitude in favour of all the members of the State. The distinction between *navigable* and *non-navigable* was not for defining the rights of private owners in the bed, but for determining the interdicts that would be applicable to any particular case. The bed of private rivers *always* belonged to the riparian owners. As to *public* rivers a distinction was made according to the nature of the land through which they flowed. Lands were: (1) *Agrii Limitatii*, *i.e.*, limited lands, *i.e.*, such as were acquired by conquest and distributed amongst the soldiery or granted to private individuals comprised within certain defined boundaries, or (2) *Agrii Artificinii*, *i.e.*, all lands bounded by natural limits, *e.g.*, rivers, mountains, &c. The ownership of beds in the former belonged to the State; in the latter, the older writers hold that it is private property, and the

* Angell divides natural streams into three divisions, viz., (1) where it is altogether private; (2) where it is private and at the same time subject to public use; and (3) where the use and property are both public. But the rights of the public in class (2) are in England in the nature of easements which the public may acquire when the stream is boatable. (*Orr Ewing et al Colquhoun et al* 2, App. C, 839.)

more recent ones hold that so long as it is covered with water it is *res nullius*. (Tagore Law Lectures, 1889, pp. 98—103.)

4 (*a*). In England rivers run but a short course, and are rarely navigable above tide-water; and hence the distinction above-mentioned was made. But in India, where the circumstances so much differ, it is a question whether the courts will follow the English law. In America, which is very much like India, there have been decisions diverging from the Common Law rule. The Continental States of Europe have not adopted it. Even here, there have been some decisions to the same effect, which may not, however, be conclusive —*Doe dem Seebkristo* v *The East India Company*, 6 M. I. A., p. 267, and *Nogender Chunder Ghose* v. *Mahomad Eusoff*, 18 Suth. W. R., 113.* In the latter case the Privy Council observed, "The learned Counsel did not contend for a distinction between a tidal river and a navigable river which has ceased to be tidal. Their lordships have no reason to suppose that in India, there is any such distinction as regards the proprietorship of the bed of the river." It may, therefore, be taken for granted that the more convenient law adopted by the Continental States would be followed here.

5. It is hardly necessary to define what *artificial* water-courses are. They generally owe their origin to artificial means, and are not natural bodies of water flowing *ex jure* natural from the earth.

6. *Bed of the stream.*—The bed of private rivers belongs to the proprietors of the land on either side, and in public ones it is vested in the Crown. The Crown is, however, rather a trustee for the public, and cannot use the bed in such a way as to militate against the rights of the public to free navigation and to fishery. This right of the Crown is limited to the *alveus* of navigable rivers up to the line of ordinary high-water mark; and beyond the line the land belongs to adjoining owners. A gradual and imperceptible diversion of the course will not take away the right of Government in the bed, but a sudden change will.

The right of owners of land adjoining private streams is this: Each owner is *primâ facie* owner of the soil of the *alveus* or bed of

* *Vide* also *Ramalakhuamma* v. *The Collector of Godavari*, V. L. J., 244; *Secretary of State for India* v. *Kadir Kutti and others*, I. L. R., 13 M., 369, and other cases decided by the Madras High Court. Muthusami Iyer, J., was of opinion that the English Law was binding until its operation was expressly excluded.

the river, *ad medium filum aquæ*. This right cannot be said to be a natural one, as it is based, more or less, on a grant, express or presumed. Evidence to the contrary may take away the right. The conveyance of a piece of land described as bounded by the river on one side, conveys also the bed of the river up to the midstream adjoining, even though without it the land conveyed is of the extent mentioned in the conveyance. Appurtenant to the right in the soil of the bed is the right to fishing which also extends up to the middle of the stream.

7. *Water—Public rivers.*—A tidal navigable river, the whole breadth of it, is a highway for the use of all Her Majesty's subjects. But the use should be a reasonable one. The public have also certain accessory rights, *i.e.*, such as are necessary for the convenient passage of vessels, *e.g.*, the right of stopping for a reasonable time to unload, and of grounding and anchoring, free of toll. An obstruction to the right of navigation being a public nuisance, no prescriptive right can be acquired thereto. Nor can such obstruction be justified by a license from the crown. The banks of rivers are not *publici juris*, and the public cannot, therefore, claim a right, except it be by custom, to landing and towing thereon. The Roman law was, however, different, and would perhaps be followed in India in preference to the Common Law.

The rights of riparian owners as such in tidal navigable rivers are not extinguished, but are only subordinated to the rights of the public. In the case of non-tidal but navigable streams, in which the public have acquired a right to navigate, the interest of the public is subordinated to that of private individuals. An owner on the banks of a navigable river has, however, the important and additional right of access from his land to the river for the purpose of exercising the public right of navigation, which is quite distinct from the similar public right.

8. *Water—Natural rights of riparian owners in private streams.* It was explained by *Lord Wensleydale*, in *Chasemore* v. *Richards*, 7 H. L., 374, that the right to the enjoyment of a natural stream of water on the surface is a natural incident to the right to the soil itself, and that the owner is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land. It was, however, at one

time maintained by high authorities that a right to the use of running water is not a right in property, that water was *publici juris*, and as such the right to use it is acquired by first occupancy. But this theory is long since exploded. "The right," says *Parke*, B., "to have a stream flow in its natural state, without diminution or alteration, is an incident of property in the land which it passes; but flowing water is *publici juris*, not in the sense that it is *bonum vacans*, to which the first occupant may acquire an exclusive right, but it is public and common in this sense only, that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that, during the time of his possession only. But each proprietor has the right to the usufruct of the stream which flows through his land"—*Embrey* v. *Owen*, 6 Ex. 353. From the above passage it will be clear that the right to the water flowing through one's land arises from the right of access to the stream and not from ownership in the soil. It consequently attaches to possession or enjoyment. Thus in *The First Assistant Collector of Nasik* v. *Shamji Dasrath Patil*, I. L. R., 7 B., p. 209, it was decided that the usufructuary interest in a stream is incident to the possession of the adjacent soil and, consequently, the occupants of the land abutting on the stream and not the Government were entitled to the enjoyment and benefit of the water as it flows past. It may be mentioned in explanation that the land in that case was ryotwari and the Government, who were the owners, claimed the usufruct.

9. The rights in natural streams, as explained above, are inseparably connected with and inherent in the property in the land and are consequently *corporeal* in their nature. The rights in artificial streams are, however, *incorporeal*, as they can only be acquired by grant, actual or presumed, or by prescription. Rights similar to those in natural streams can be acquired in artificial ones under certain circumstances, but they will also be in the nature of easements.

10. Riparian proprietors have got the right to the flow of water through their lands *undiminished in quantity* and *undeteriorated in quality*. These rights will now be more fully explained.

"By the general law applicable to running streams," says Lord Kingsdown, "every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle; and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream" *Minor* v. *Gilmour,* 12 M. P. C., 131. 'Domestic purposes' includes culinary purposes, cleansing and washing, feeding and supplying the ordinary quantity of cattle, and so on. 'Brewing' would also appear to be a domestic use in England. But apart from this right to the ordinary use of water, every riparian proprietor has also the right to the use of water for any purpose, or what may be deemed the extraordinary use of it, *provided* he does not thereby interfere with the rights of other proprietors either above or below. This proviso is a very important one, and subject to it, the proprietor may dam up the water for the purpose of a mill or divert it for irrigation. The law on this point has been very clearly laid down by *Cairns,* L. C., "Undoubtedly the lower riparian owner is entitled to the accustomed flow of water for the ordinary purposes for which he can use it; that is quite consistent with the right of upper owners also to use the water for all ordinary purposes, *viz.,* as has been said, *ad lavandam et ad potandam,* whatever portion of the water may be thereby exhausted and cease to come down by means of that use. But further, there are uses, no doubt, to which the water may be put by the upper owner, *e.g.,* uses connected with the tenement of the upper owner, under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation..........Again, it may well be that there may be a use of the water by the upper owner, for, say, manufacturing purposes, so reasonable that no just complaint can be made on the subject by the lower owner. .... Whether it was a reasonable one would depend, at all events, in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water"—*Swindon Water Co.* v. *Wilts and Besks Canal?* It is, however, necessary that this extraordinary use, as stated above, should be for the use of the riparian tenement. If it be not so, an action would lie at once whether actual damage is proved or not. Further, the

use should be a reasonable one. What this is will depend upon the circumstances of each case, and no hard and fast rule can be laid down.

When water is taken for purposes of irrigation, the proprietor has the right to take so much only of the water of the stream as can be abstracted without materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below and without impairing its quality. What quantity of water can be abstracted and consumed without infringing the essential condition must, however, in all cases be a question of circumstances depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume. Suppose, however, that A_1, A_2, A_3,.....................A_n are successive riparian owners on the banks of a natural stream, and that each exercises his right to the extraordinary use of the water. It may be that the exercise of the right of each is in itself reasonable; but it may, nevertheless, so happen that A_n is injured by the joint action of all the higher riparian owners. Can A_n then sue all or any of them? The decisions on the subject do not help us here. It is, however, suggested that the person whose act is the immediate and proximate cause of the injury will be held responsible, *i.e., the last in point of time.*

It has been held that an Inamdar has got the right to irrigate his lands adjacent to the stream, even for the purpose of converting his dry lands into wet, if he does not thereby materially affect the rights of other riparian owners. *Narasimha Sastrial* v. *The Secy. of State for India,* I. M. L. J., 167. In that case it was further held that the Government had no power to control such right.

Agriculture being the main industry in India, it may perhaps be better to hold that the use of water for irrigation is but an ordinary use.' (*Vide* the arguments of Mr. Justice *Subrahmania Iyer,* then counsel, in the case last quoted.) Such use must, however, be reasonable; for instance, a riparian owner, who has only a small frontage, cannot be allowed to irrigate all his fields, however, extensive they may be.

The rights of riparian owners existing *ex jure naturæ,* are not limited by the present mode of enjoyment, and a new mode of

enjoying gives a right at once to sue for an injury done in respect of such new use. It also appears that when a riparian owner diverts for the purpose of his tenement the waters of a natural stream by artificial means, he has the same rights in the new artificial channel cut through his riparian lands as he had on the original stream. (*Vide* Pollock, C. B., and Channel, B., in *Nuttel* v. *Bramwell*, L. R., 2 Ex. 1.)

11. Next as to *pollution of streams:* A riparian proprietor on a natural stream has also the right to receive the water in an unpolluted state; and a pollution gives a cause of action without showing actual injury, and the fact that the stream is also fouled by other persons is no defence.

It is essential here to notice that the law makes no difference between natural and artificial channels with respect to the right to the purity of water; nor is the fact that the water finds its way by spreading over the ground or by percolation material. The principle appears to be that the law will not force a man to do a thing for another's benefit, but at the same time it will not countenance the act of a person which injures another. If water is prevented from flowing to land, nothing is done on the land to its detriment; but if dirty water is sent on to the land, a nuisance is created thereon, which is clearly a ground for complaint and can be justified only by acquiring a prescriptive or other right thereto. (*Vide Hodgekinson* v. *Ennor*, 32 L. J. Q. B., 231, and *Ballard* v. *Tomlinson*, 54 L. J., Ch. 454.)

Though it is not necessary that actual damage should be proved for enabling a person to bring an action for pollution, yet actual pollution of some character or other must be proved. The mere throwing of innocuous matter into the stream is not of itself actionable. What is '*pollution*' can be determined as in the other cases only on a consideration of each case. "The size and character of the stream, the use to which it can be or is applied, the nature and importance of the right claimed and exercised by one party, as well as the inconvenience or injury to the other party would be subjects involved in the enquiry." It has been held that discharging heated water into a stream injuriously is a pollution, *i.e.*, the owner has the right to receive the water at the same temperature. (*Cf.* S. 7 of the Easements Act, Il. h.)

11*a*. For other riparian rights, the reader is referred to Tagore Law Lectures, 1889, p. 261 *et seq*.

12. We next come to *artificial* water-courses: When the water does not rise to the surface in a natural way, or when the water is conducted by artificial means, the stream is said to be an artificial one. It was once considered that no rights can be acquired in the nature of easements under any circumstances. But the law as now settled recognises such rights under certain conditions. Thus in *Wood* v. *Waud* (3 Ex. 777), it was said: "The right to artificial water-courses against the party creating them, surely must depend upon the character, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created." In Gale on Easements we find: "Supposing it to be unknown by which party the flow of water was caused and that the flow is beneficial to the owners of both tenements—to the one by the discharge, to the other, by the use to which he puts the water on receiving it—it would probably be presumed that a reciprocal easement did exist." In India it is now beyond doubt that such a right can exist in artificial streams. The Privy Council laid down in distinct terms in *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, 6 I. A., 33, that a right by way of easement can be claimed in the surplus water of a tank. In *Maharani Rajroop Koer* v. *Syed Abul Hossein*, 7 I. A., 240, it was further decided that such a right may exist apart from prescription. It appears clear from these and other authorities on the subject that from immemorial user it may be inferred that such a right had its origin in a grant: but it is essential to raise such a presumption that it should be proved that the arrangement was intended to be a permanent one. However long may be the user, no right can be acquired, either by way of prescription, or under the presumption of a grant, in water pumped out of a mine, as it was clearly intended only for the benefit of the dominant owner. But if a channel was constructed as part of a permanent system of irrigation, it would be of such a permanent character as to raise the presumption that it was intended for the benefit of both the parties. Long user, in such cases, will give to the servient owner a right to the flow of water. It may be mentioned that it is unnecessary for raising the presumption of a grant, that user for a fixed or minimum number of years, say, for example, the period required to acquire a prescriptive right, should be proved. User

for a shorter period coupled with circumstances from which a grant can be inferred, would be quite sufficient. As against Government long user may justify a presumption of an original *animus dedicandi*. In *The First Assistant Collector of Nasik* v. *Shanji Dasrath Patil*, I. L. R., 7 B., 209, already quoted, the facts were :- A dam had been in existence across a river for upwards of 280 years, and during all that time the villages of D. and P. had received an equal supply of water from separate sluices in the dam. The Government authorities being of opinion that village D. required less water than P. reduced the size of the D. sluice. The village D. was a ryotwari one, and the ryots of D. appealed against the action of Government. It was held by the High Court that, though Government might have in this country the power to regulate the enjoyment and benefit of the water in the interests of the public, the user found proved was sufficient to justify a presumption of an original *animus dedicandi*.

If the party by whom or on whose behalf the artificial stream was caused to flow is shown to have abandoned it permanently, such stream may become subject to the laws relating to natural streams. Riparian rights may be granted to non-riparian owners; but their rights will be limited to the extent of the right of the riparian proprietor from whom title is derived.

13. Then as to *water percolating* and *surface water* : It is an established proposition of law * that there can be no right to mere surface water or to water that finds its way by percolation : as already stated in order to acquire a right, the water should have a defined course. If A. digs a well in his land and thereby takes away water in the well on B.'s land, B. has no cause of action if A. does not interfere with any defined channels. It does not in the least matter that A. uses the well for purposes unconnected with the tenement, *e.g.*, for supplying the whole town with water nor is it of any consequence that the use interfered with has been uninterrupted and of long duration. It is, however, also established law that if in drawing off water that finds its way by percolation to an adjoining land, the person also draws off water flowing in a defined surface (*semble* also underground) channel,

* It is possible that under the Easements Act a right may be acquired to surface water under an express grant—*vide* S. 7, Ex. (8.)

then he will be liable to action. The distinction, which is a fine one, may be made clearer. If a person intercepts water not running in a defined course *before* it reaches a defined surface channel, then he is not liable to action; but if in so doing he also interferes with water that had *already* found its way into the channel, then he will be restrained from exercising that right. The right becomes dead in fact, though not in law. It has, however, been decided (*a*) that if the owner of land collects water percolating from a natural stream running into the land, he acquires a right to such water and he may sell such right; and if such water is made to run in a stream, such stream will be considered a continuation of the original stream. In *Ennor* v. *Bramwell* (1 D. G. F. J. 529), the Vice-Chancellor was of opinion that the question, whether the principle established by *Chasemore* v. *Richards*, is applicable to a particular case, is affected by the distance through which the water would have to percolate before reaching the plaintiff's land; but this opinion is not borne out by existing authorities.

14. We next come to *easements*. The Easements Act has defined the law so far as this Presidency is concerned, and it is unnecessary to go into the subject in any detail. The more important points will, however, be noticed.

Easements are, as already stated, restrictions of natural rights. They are either permanent or temporary. Permanent ones may be acquired by grant, express, implied or presumed, prescription, custom or statute; temporary ones cannot be acquired by prescription, by grant presumed or (*sic*) by custom; for such a right is inconsistent with the presumption raised in these cases. As instance of a grant implied may be mentioned easements acquired on severance of tenements. There is a difference between the Indian and the English Law in this respect. The English Law will not presume the reservation of apparent continual easements by the transferor—a grantor can never derogate from his grant except by express terms; but here, under the Act, such reservation is implied (*vide* S. 13). As an instance of customary easements may be cited the case in *Orr & others* v. *Ramen Chetti and others*, 18 M. 320. They are generally usages attached to a locality. It seems clear that persons owning land not abutting on a stream may also acquire

(*a*) *Holker* v. *Poritt and others* (8 Ex. 107).

easements in respect of that stream. For the acquisition of a prescriptive right the enjoyment should have been 'as of right,' *i.e., adverse.*

The Transfer of Property Act requires a registered instrument for the transfer of easements; and very probably a similar instrument will be required for their creation; though the law is silent.

The different modes of extinction are enumerated in Chapter V of the Easements Act. Under certain circumstances an easement may be revived (*vide* S. 51).

15. We propose now to state what we think the rights of Government are in this country in non-tidal streams. It is a question of some importance, and is well worth further investigation.

16. To understand the rights of Government in flowing water, it is necessary to have a clear conception of its rights in the soil. Lands are in this country, either permanently settled or ryotwari. To the former class belong zamindaries, polliams (*sic,*) inams, &c. The assessment in these cases has been permanently fixed once for all and is not subject to revision on any account what-so-ever. In ryotwari lands, however, the assessment is revised periodically with reference to the increase in the profits due to causes other than improvements effected by the tenants, chiefly with reference to the increase in prices. It has been admitted on all hands that the soil in the latter class of lands, *viz.,* ryotwari, belongs to the State, the ryots having only the right of occupancy so long as they make no default in paying assessment. Even in the case of permanently settled estates, Mr. S. Sreenivasa Raghavaiyangar in his Memorandum on the Progress of the Madras Presidency has tried to prove that the Zamindars, Polligars or other proprietors were given only the *melwaram* right of Government, and that it was never intended to give them the proprietary right in the soil. We consider that the learned author merely advanced an argument to *justify* his proposed piece of legislation for the amelioration of the condition of the ryots, and did not intend seriously to press that the Regulations XXV of 1802 (Section 2) and IV of 1822 do bear the construction that he wished to put upon them. In any case, it is doubtful if the Courts in this country will look at the Regulations in the same light as he has done. We shall

therefore adopt the more acceptable view, *viz.*, that the Zamindars, &c., have full proprietary ownership in the soil.

17. The proprietors of permanently settled estates being thus owners of the soil, it follows the English law would apply *in toto* to such estates. The banks belong to the owners, and the bed also, unless the view that in all navigable rivers the bed belongs to the State is accepted. As regards water, the proprietors or their tenants have full riparian rights. The Courts have in several cases recognized the right of Government to regulate the supply of water in the interests of the public, but such right has not been well defined. It may be taken for granted that the Government cannot interfere in exercise of their power with the riparian rights of the proprietors or their tenants. (*Narasimha Sastrial* v. *The Secretary of State for India*, M. L. J., Vol. I, p. 167.) In the case of ryotwari lands, the bed belongs to the State, and it appears that the Government has reserved its right in the banks. The ryots of adjoining lands have, however, the right of access to the stream and full riparian rights to the water. In this case also, it is not clear how far the right of Government to regulate the supply according to public requirements abridges such rights. The Easements Act, Section 2 (*a*), no doubt recognizes the existence of such a right in Government. In the case of works constructed at the public expense the Government may have very large powers, as such works are in the nature of artificial water-courses; but the mere constructions of a dam or sluice or an anicut cannot bring a natural stream under this class. In *Ponnusami Tevar* v. *The Collector of Madura* (5 M. H. C. R., p. 29), Justice *Innes* qualifies the right of Government to collect, retain and distribute the water of natural rivers thus;—"The Government of this country has at all times assumed to itself and has the right in the interests of the public to regulate the distribution for use of any portion of the water flowing *in the natural channels in which rights have not as yet been acquired.*" This is perhaps the more correct view, and the existing rights of the ryots cannot therefore be interfered with.

18. There is one other question which calls for notice, *viz.*, the liability of Government in case of floods. According to the English law, a riparian owner on inland waters has an ordinary right *primâ facie* to protect his land from the inroads of flood water, *provided* he can do so without injury to others. (*R.* v. *Trafford*,

8 Bing. 204.) In the case of extraordinary floods, he can protect himself without regard to the consequences in respect of others. (*Nield* v. *L. N. W. Ry. Co.,* L. R., 10., Ex. 4.) In Zamindaris, &c., the proprietors have perhaps the same rights(?)* The Government, however, stand in a different position in respect of ryotwari lands. It has undertaken to maintain the banks for the benefit of the riparian owners on either side of the river. What then is its liability—1st, in respect of natural streams, and, 2ndly, in the case of works constructed at the public expense? In the first case, the stream being a natural one, there cannot be *absolute* liability; but we are of opinion that for negligence proved, the Government will be liable. Even as regards the latter class of works, as they are constructed for public utility, the Government will perhaps be exonerated from *absolute* liablility.

T. RAJARAM ROW.

TRANSLATED FROM THE VIVADARATNAKARA.

On Payment of Debts.

On this subject, Brihaspati says: "By whom, at what place and in what manner, should and should not, be paid a debt taken from another's hands according to the law of kusida (interest), is now declared. A debt contracted without any stipulation as to time should be paid on demand; or (where any time is fixed) when the (stipulated) time has expired or when the interest has ceased to accrue. In default of the father, the debts should be discharged by the sons."(1) Prakála:—time fixed (for payment). If a debt had been contracted without any stipulation as to the time (of repayment) then it should be paid as soon as demanded; but if there be any stipulated time, the debt borrowed should be paid when the time expires. The construction is 'in default of the father, it should be paid by the sons.'

Accordingly: "The debt of the father should be paid first; and then one's own debt; before both of these should the debt of the paternal grandfather be paid; thus should debts always be discharged."(2) A man should discharge the three debts, *i.e.*, that

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* Even here, in the case of public works, the Government will be liable for negligence proved.

(1) Brihaspati, XI, 46 and 47. (2) Ibid, XI, 48.

of the grandfather, etc. The meaning is that he shall discharge first, the paternal grandfather's debts; then his father's; and then, his own.

Narada says: "When the father is dead, the sons divided, or undivided shall pay the debt according to their shares; or the manager of these."(1)

Yajnavalkya: "When the father has gone to a foreign country, is dead or immersed in grief, the debts should be paid by sons and grandsons, after they have been proved by witnesses in case of doubt."(2) The meaning is that where the father is unable, his debts should be paid by his sons, and in default of them by his grandsons. 'In case of doubt,' *i.e.*, if it is concealed by the debtor. 'Proved by witnesses' established by evidence that the sum is due.

Katyayana: "A debt of the paternal grandfather proved or the balance unpaid (of a debt) should be paid [by the grandsons when proved; but never shall a debt (of the grandfather) incurred for immoral purposes or questioned by the father be paid."(3) Proved, established by evidence. For immoral purposes] for spending in gambling or spirituous liquors, etc., gambling, spirituous liquors, etc., will be described presently. Questioned:—contested by the father that 'this shall not be paid.'

Accordingly: "Bhrigu has ordained that a debt, descending from the grandfather in succession and proved by the father should be paid by the grandsons if it had not been incurred for immoral purposes and not (already) been paid by the sons. That debt of the grandfather which had not been paid by sons who are diceased, etc., should similarly be paid by the grandsons without interest."(4) [Proved:—established by evidence. Not incurred for immoral purposes] not for spending in gambling or spirituous liquors.

Katyayana: "But if a creditor claim a large sum of money, only so much as the creditor may prove by witnesses (to be due to him) shall he recover as a debt."(5) The meaning is that if a creditor claim a large sum of money, only so much as the creditor

(1) Narada, I, 2.
(2) Yajnavalkya, II, 50.
(3) I, Cole, Dig., 207, CXCVI.
(4) Ibid, 207, CXCVII.
(5) Ibid, 208, CC.

proves shall the debtor raising a false defence be made to pay; but he shall not be made to pay even the unproved portion. "By witnesses" denotes only evidence in general.

Accordingly: "The debts contracted by the fourth in ascent, should be discharged, in the absence of patrimony, by the grandsons even with difficulty; after them, that (right of discharging the debts) ceases."(1) The (duty of discharging) debts contracted by the fourth in ascent ceases with the great grandson. The purport is that the great grandson shall not pay the debts of the paternal great grandfather.

Narada: "Whatever debts of the grandfather remain undischarged by his sons should be discharged by his grandsons; that ceases with the fourth (in descent)."(2) Regularly] duly from the father and the paternal grandfather. With the fourth] with the great grandson.

Brihaspati says: "The debts of the father when proved should be liquidated by the sons, like their own debts; the principal only of the grandfather's debts should be discharged by the grandsons; but it is not payable by his son, (*i.e.*, great grandson)."(3) The meaning is: the father's debt when proved, shall be paid by the sons, as their own debt, *i.e.*, with interest; and by the grandsons without interest. It need not be discharged at all by the great grandsons.

Yajnavalkya: "Debts secured by documents should be paid by three persons only; but a pledge shall be enjoyed as long as it is not paid."(4)

As for the undischargability stated of the debts from the great grandsons downwards that should be understood to apply where the debt is incurred by the great grandfather, etc., without pledging land, etc., to be enjoyed. The meaning is that debt contracted after pledging anything should be paid even by the fourth in descent downwards of the same family.

Vishnu: "Where the debtor is dead, or has entered the order of a Sanyasin, or has remained for twenty years in a foreign

(1) I, Cole. Dig., 208, CXCVIII.
(2) Narada I, 4.
(3) Brihaspati, XI, 49.
(4) Yajnavalkya, II, 90.

country, the sum lent should be paid by his sons and grandsons; beyond that (it need not be paid by descendant) if unwilling."(1) The term 'twenty years' goes with 'remaining in a foreign country.' 'Beyond that,' *i.e.*, after the third in descent; that is, it need not be paid by the fourth in descent, etc. By the term 'if unwilling' is indicated that if there be a wish to benefit their great grandfather and the rest, then the debts even of these may be discharged by the great grandsons, etc.

Narada: "If a person goes to a foreign land, his son, paternal uncle or eldest brother shall not pay his debts before twenty years have elapsed."(2)

Kátyáyana: "During the lifetime of a diseased person, or of one who has gone to a foreign land, his sons shall not pay his debts before twenty years have elapsed."(3) This should be understood to apply only where there may be hope of the diseased person recovering and of the person who had gone abroad returning. Where, however, the diseased person is suffering from incurable diseases, and where, the person who had gone abroad is not expected to arrive, in that case, even during the lifetime of the aged father, his son deserves to pay the debt at once; the lapse of twenty years need not be waited for.

The same author states that: "Even during the lifetime of diseased, mad, or aged fathers, and of those likewise who have remained long abroad, their sons should be made to pay their debts."(4)

Brihaspati also states that, even where the father who is suffering from incurable diseases such as consumption, etc., is near, his debt should be discharged by the sons only: "Even when the father who is blind from birth, degraded, mad, or suffering from consumption, dropsy, etc., is alive, his debt should be paid by his sons when proved."(5) Játyandha] blind from birth. The term 'of those suffering from consumption, dropsy, etc.,' is illustrative of incurable diseases. The statement in the Parijata that the purport is if the father is altogether incompetent to discharge debts, then the debts should be discharged by the son, is only fair. Really, if

(1) Vishnu, VI, 27.
(2) Narada, I, 14.
(3) Not found.
(4) II, Cole. Dig., 193, CLXXVII.
(5) I, Cole. Dig., 193, CLXXVIIII.

the father is so (diseased) as to be incompetent to share, and the son possesses no separate wealth, then the debt should be paid by the son only; but where the father possesses exclusive property of his own, then, even though he is so (suffering from incurable diseases), the debt should be paid by him alone. Where, however, the father is altogether unfit to discharge the debts, and the son competent, then it should be paid by the son alone.

Accordingly: "When the father goes to a foreign country, the debt which had been jointly borrowed by him, the son shall pay entire; and when the father is dead, (he shall pay) his father's share of the debt alone and never that of others."(1) What debts had been borrowed conjointly with another by the father then, in the absence of the other and when the father has gone abroad, the son shall give his father's share and that of the other; but when the father is dead, he shall pay his father's share only. This is the meaning.

Narada: "The debts borrowed conjointly should, even where one is present, be discharged; when they are dead, their sons need not pay the other's debts."(2) The meaning is this: The debt contracted conjointly should be discharged entire even when one only of them is alive. But where all the joint debtors die, their sons should discharge it according to their shares, and one only of them need not pay the whole.

Kátyayana: "Of those who have jointly contracted debt, if one of them alone is alive, his son shall give the whole debt if the father is gone abroad and his father's share only if the father be dead."(3) The meaning is that if among all those joint debtors, one alone is alive, then he by himself should be made to pay the whole; or if the father has gone abroad and if his son is alive, he also should be made to discharge the whole; but if the father be dead and the son be alive, he shall be forced to pay his father's share only and not the whole.

Vishnu: "The debt contracted conjointly, by unseparated brothers, he of them who is present, should pay; so also the paternal debt should be discharged by him who is present. If they be

(1) I, Cole. Dig., 199, CLXXXIV.
(2) Narada, I, 15.
(3) I, Cole. Dig., 199, CLXXXIV.

divided, they should pay the debt according to their shares."(1) Whatever debt is jointly borrowed by undivided co-parceners, he of them who is alive, though one, shall pay; he, though one, of the undivided brothers who is alive, shall pay the entire debt of the father; but separated brothers shall pay according to their several shares. This is the meaning.

Yajnavalkya: "What debt is contracted by unseparated co-parceners for the family, the heirs shall pay if the head of the family be dead or gone abroad."(2) The meaning is that what debt is borrowed for the family by even one of the undivided parceners, the other undivided parceners shall pay when the borrower is dead or has gone abroad.

Narada: "Whatever debt is contracted for the family by the undivided paternal uncle, brother, or even mother, that all the co-heirs shall pay."(3)

Manu: "If the debtor be dead and (the sum borrowed) was expended for the family, it must be paid by the relatives out of their own (property), even though they be divided."(4) "Dead" is illustrative. Out of their own] own property. The meaning of this is that if one of the co-heirs who possess wealth distinct from each other borrows money for the necessary support of all the co-heirs and becomes incapable of paying the debt owing to death, etc., then that debt is payable by all the co-heirs.

Brihaspati: "The head of the family must pay any debt incurred for the family by the paternal uncle, brother, son, wife, slave, pupil and dependents."(5) The purport here is that debts incurred for the family by others even, should be discharged by the head of the family.

Narada: "Though independent, one is not liable to pay the debt if he had not attained age."(6)

Kátyayana: "When the father is dead, his debts are not payable by (his sons) who have not attained age; but when they have come of age, it should be discharged according to law;

(1) Vishnu, VI, 34 and 35.
(2) Yajnavalkya II, 45.
(3) Narada, I, 3.
(4) Found in Narada, I, 13.
(5) Brihaspati, XI, 50.
(6) I, Cole Dig., 261, Cl. XXXVIII.

otherwise, they will live in hell."(1) The meaning is that even though the father is dead, the debts are not to be paid by the sons not of age; but should be paid by them when they attain age. "According to law," *i.e.*, according to shares, or as the case may be.

Narada: "Ancestors wish for sons for their own benefit, because they think 'this son will absolve me from debts to the high and the low.' Therefore, the father should be absolved from debt by the son born at any effort reckless of his own benefit, so that the father may not go to hell. If one dies debtor, whether a devotee or agnihotri, (the benefit of) all the devotion and agnihotra accrues to the creditor."(2) Debts to the high and the low] debts to the high, *i.e.*, debts due to the gods, the sages and the manes and 'debts to the low,' *i.e.*, debts due to men. But Halayudha, considering that the text occurs in the context regarding debts due to men, interprets the expression to mean "low debts due to creditors. Debts are low because debts not paid are a source of great evil. The rest is easy to understand."

Brihaspati says: "He who, having received a debt, etc., does not give it to the owner will be born in his house as his servant, son, wife or cow."(3) The word 'ujjama' means 'debt.' By the word 'adi' is denoted deposit, etc.

Manu says: "Whatever acts are done, even by a servant for the benefit of the family either in the same or different country, the master shall not question."(4) Adhyadinah] servant, etc. Jyáyán] here master.

Narada says: "Whatever is borrowed on account of the family by a disciple, attache, servant, or woman, business agent should be paid by the master of the family."(5) Vaiyáprityakarah] business agent. Uchchannam] debt borrowed.

Vishnu says: "What has been agreed to be paid or borrowed on account of the family should be paid."(6) The word 'debt' should be supplied. Any debt contracted by another though not on account of the family if he had undertaken to pay it should be paid. Debt borrowed on account of the family should certainly be paid.

(1) I, Cole. Dig., 201 Cl. XXXVIII.
(2) Narada, I, 5 and 9.
(3) Not found.
(4) Not found.
(5) Narada, I, 12.
(6) Vishnu, VI, 38 and 39.

Kátyayana says: "What is borrowed by an incapable or diseased man on account of the family, or during distress should be known as debt borrowed in distress, as also debt borrowed for the marriage of a maiden, or for funeral rites; all these should be given by the master of the family."(1) The genitive case in 'master' denotes the doer. Therefore, it means that it should be discharged by the head of the family.

Accordingly: "Bhrigu has ordained that even if a debt has been incurred for the family of a person who had gone abroad by a servant, wife, mother, pupil or son, without his consent, he should pay it."(2) The purport is that it is the opinion of Bhrigu that the debt contracted by the son or the servant, etc., for the support of the family of a person who had gone abroad even without his consent, the person so gone abroad shall pay.

Narada: "The father shall pay any debt incurred by the son with his consent or (without it) for the maintenance of the family, or while in distress."(3) Krichchre] while in distress.

Brihaspati: "Debts contracted by the son should be paid by the father, if he had consented to it; or he may pay it out of affection for his son; otherwise he need not pay."(4)

Kàtyayana: "According to law, the debts contracted by the son need not be paid by the father; but he must discharge it if he had promised or subsequently agreed to it."(5) "Promised" here means 'consented at the time of taking the loan'; and 'subsequently agreed' means 'promised after taking the loan. The using of the word 'son' is illustrative.

Manu: "The son shall not pay debt contracted by the father as surety, useless gifts, spending in gambling, or drinking and what remains unpaid of a fine or toll. The rule stated applies to the case of a surety for appearance."(6) By 'surety' are here indicated the surety for appearance and for confidence. Useless gifts] gifts which produce no benefit: Akshikam] for gambling. Saurikam] for spirituous liquors. Here is described (the debt) which originates

(1) I, Cole. Dig., 208, CXCIII.
(2) Not found.
(3) Narada, I, 11.
(4) Not found.
(5) Not found.
(6) Not found.

in gambling and spirituous liquors. By 'surety for appearance' is to be understood the surety for confidence also.

Brihaspati: "Sons shall not be compelled to discharge debts contracted by their father for spirituous liquors, for gambling, for promises made under the influence of love or wrath, for suretyship, or what remains unpaid of a fine or toll."(1) Promises made out of love or when angry, shall be described presently.

Gautama: "Money due by a surety, commercial debts, sulka, debt incurred for liquor, and for gambling, and fines shall not affect the sons."(2) The meaning is that money due by a surety, debts for commerce, etc., are not to be discharged by the sons.

Vyasa: "Neither a fine nor what remains unpaid of a fine, neither a toll nor what remains unpaid of a toll, shall be paid by the sons, nor an immoral debt."(3) Here, because by the expression 'a fine,' is denoted also the balance due of a fine and it is nevertheless repeated, the meaning should be that if the fine is very great, it should be paid; if the balance due be small, it need never be given; and that if the fine is small, the whole need not be given.

(A text states): "What has been promised (by a person) with or without a document, to a woman who belonged to another before, one should know that to be a debt incurred out of love. But let one consider that a debt incurred under the influence of anger, which one has promised to gratify another whom he has injured or whose property he had destroyed."(4) Ukta] promised. Likhitva] secured in writing. Muktakam] without document. A debt incurred under the influence of love is the debt which one incurs being short of funds to pay what has been promised to a woman who belonged to another before. The expression 'woman who belonged to another before' refers only to a woman who is not married. The debt which one borrows to give to and please another whose wealth he had destroyed out of anger or whom he had injured is called debt made by wrath. It is these alone that have been previously referred to as debts made by love and wrath.

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(1) Brihaspati, IX, 51.
(2) Goutama, XII, 41.
(3) I. Cole. Dig., 211, CCIII.
(4) Ibid 212, CCIV.

Yajnavalkya: "A woman shall not pay a debt contracted by her husband or son, a father that incurred by a son, and likewise a husband, that by a wife, unless it be incurred for the family."(1)

Vishnu: "Neither the husband nor the son (shall pay) debts borrowed by a woman."(2)

Katyayana: "The debt contracted by the wife is payable by the husband, that contracted by the mother is payable by the son, if borrowed for the support, when he has left word and gone abroad."(3) The meaning is that where the husband or the son does not provide for the maintenance of the wife or the mother, or goes abroad, then the debt incurred by the wife or the mother for her maintenance and clothing should be paid by the husband or the son. 'Having left word,' that being generally done so; for the reason equally applies even where no word is left.

"The debt incurred by the wife, if it is not in distress, is not payable by the husband; for the necessities of the family are indispensable."(4) The meaning is that debts of the wife, excepting that incurred for the family while in distress, are not payable by the husband.

Yajnavalkya: "The debts incurred by the wives of a herdsman, a vintner, a dancer, a washerman, and a hunter, their husbands shall pay; for their livelihood is dependent upon them."(5) Sailúsha] dancer.

Brihaspati: "The debts contracted by the wife of a vintner, or hunter, or washerman, or herdsman, or a barber, the husband shall pay; (for) it was incurred in the concerns of the husband."(6) The purport is that their husband shall be made to pay their debt, for the debt was incurred by them in the concerns of the husband. Here regard should be had to the living in dependence on their labour and not to the class to which they belong.

Yajnavalkya: "What is agreed to by the husband, (what is) borrowed jointly with her husband or by herself, all this is payable (by her); a woman shall not pay any other debt."(7)

(1) Yajnavalkya, II, 46.
(2) Vishnu, VI, 28.
(3) I. Cole. Dig., 219, CCXIX.
(4) Narada, I, 18.
(5) Yajnavalkya, II, 18.
(6) Brihaspati, XI, 53.
(7) Yajnavalkya, II, 49

Katyayana: "A debt contracted by a woman jointly with her husband or her son or by the woman herself alone, shall be paid (by her); in such and in no other case is debt contracted by them payable by her."(1) Contracted by them] incurred by the husband and the son.

Accordingly: "If a woman be asked by her husband at his death-bed, 'pay this debt', she must pay it, however unwilling, if wealth is left with her."(2) The meaning is that if a woman is ordered by her husband, whose death is near or who is shortly to go abroad, that some debt is payable by her, she should, on his death or when he had gone abroad, be compelled by the king to pay such debt, even though she be unwilling. 'Who is at his death-bed' is only illustrative.

Narada: "The childless widow shall pay the debts of a person whether ordered by him at his death-bed to do so or not, or he who takes his wealth shall pay his debts."(3) By 'or he,' etc., is meant that whatever other person takes the wealth, he should also pay the debts.

Vishnu: "He who takes the wealth of a man with or without male issue shall pay his debts; but the debts of a moneyless man, the taker of his wife shall discharge."(4) Dhana] debt. But in the word 'adhanasya' (of a moneyless man), *dhana* is used in the sense of wealth.

In this connexion Narada states that kind of women, who taken, the taker becomes liable to pay the debts incurred by her husband: "She who is the last mentioned of 'harlots' and she who is first mentioned of 'twice-married women'; the enjoyer of these is bound to pay the debts of their (former) husbands."(5) This is the meaning. The fourth of the four sorts of harlots and the first mentioned of the three sorts of twice-married women; taking these two alone, one should pay the debt incurred by their (former husband) and (one need not pay) the debt incurred by the husband of other kinds of women.

Narada himself states that threefold (classification of) twice-married women and the fourfold (one of) harlots. It is thus:

(1) I, Cole. Dig., 216, CCXI.
(2) *Ibid*, 216, CCXI.
(3) Narada, I, 17.
(4) Vishnu, VI, 29 and 30.
(5) Narada, I, 24.

"Seven other sorts of wives who had been previously enjoyed by another are laid down. Of these the twice-married woman is of three kinds; and the harlot of four. A maiden not deflowered, but disgraced by the ceremony of marriage, is the first kind of twice-married woman, because of the performance again of the (marriage) sacrament. That woman who having become bold is given away (in marriage) by elders according to the law of the land, is declared to be the second. She who is given, in the absence of brothers-in-law, by her relatives to a person of the same caste or to a sapinda, is the third. That woman, who, whether having children or not, goes to live with another man through love, while her husband is alive, is the first harlot. She who abandons the husband of her youth and betakes herself to another man and afterwards returns to her husband's house, is declared to be the second class of harlots. She who, when her husband is dead, rejects her brothers-in-law and the rest and unites herself with another through lust is the third class. She who has come from a foreign land being bought for money, and afflicted with hunger and thirst and who gives herself to one saying 'thine I am' is the fourth."(1)

Katyayana: "The debt contracted by vintners, etc., who have neither money nor issue, he who enjoys their women shall certainly discharge."(2)

Narada: "He who takes the wife of a man dying without money or issue shall pay his debts; for she is considered his property."(3)

This text of Narada should be understood to apply to the case of vintners, etc., mentioned by Katyayana.

Yajnavalkya: "He who takes the wealth shall be made to pay the debts; so also he who takes the wife; the son shall not be made to (pay the debt) where the wealth had been taken by others; the debts of a childless man, the heirs shall pay."(4) By 'the son, etc.,' is meant that the son though living is not bound to pay the debts, if the (father's) property had been inherited by another. Here, the construction is "he shall not be made to pay the debts." Here the son who is competent to take the wealth of the father is denoted,

(1) Ibid, III, 46—52.
(2) I, Cole. Dig., 323, CCXXII.
(3) Narada, I, 22.
(4) Yajnavalkya, II, 51.

and not the son who has obtained the wealth of the father, because he is implied by the term 'he who takes the wealth.' Kalpataru states that this is to prohibit the liability of the sons of persons, blind, lame, etc., who are incompetent to inherit their father's property, to discharge their father's debts.

Narada: "Of the taker of the wealth, the taker of the widow and the sons, he who takes the wealth shall pay the debts; in the absence of the takers of the widow and of the wealth, the son (shall pay); and in the absence of the person who takes the wealth and of the son, the taker of the widow (shall pay)."(1) The meaning of this is: If there be the person who takes the wealth of the debtor, the person who takes his widow and the son who answers to the description laid down by Katyayana, then the person who takes the wealth and not the others shall be made to pay the debts; so also if there exist the taker of the widow and the son of that description, then the taker of the widow and not the son (shall be made to pay); if, however, the son is possessed of all qualities as being free from disability, etc., laid down by Katyayana, then he alone shall pay the debt.

Katyayana says that: "The son shall be made to pay the debts, if he be free from disability, competent to inherit and able; if otherwise he shall not be made to pay. Where the son is immersed in grief or young, then the taker of the wealth shall be made to pay (the debts); in his default the taker of the widow."(2) Competent to inherit] devoid of (defects such as) being born blind, or deaf, etc. Able] able to bear the debts. The construction is that where there is the taker of the wealth and the son is immersed in grief, etc., then the former should be made to pay.

Brihaspati: "The discharger of the debts is he who takes the wealth, if the son is disabled; so also the taker of the widow, in default of the taker of the wealth."(3) It must be understood that in the absence of both of these, the son though suffering from disability shall discharge the debt, as inculcated by Narada.

Yajnavalkya: "He who takes the wealth shall be made to pay the debt; likewise, he who takes the widow; and not the son

(1) Narada, I, 23.
(2) Not found.
(3) Brihaspati, XI, 52.

where the property is taken by another; the heirs shall pay the debts of the sonless person."(1) Here also, the purport is that if there be a son and the property is not taken by another, he alone shall pay the debts; and if that be not the case, he who takes the wealth and he who takes the widow (shall pay).

Katyayana: "If a woman, in the absence of daughters, and without the consent of her son, and possessing large stridhana property, leaves her son and lives in dependence upon another, her property shall be taken by the son. He shall take it for paying the debt and not for his own enjoyment; for the parents shall not be made to give on improper grounds. Manu says that if a mother abandons her own son though competent, the son shall in that case take her stridhana property and discharge the father's debts."(2) Amatena] without his consent. "Having much wealth," having large stridhana property. In the absence of daughters] if there are no daughters. The meaning of the third verse is this: If a woman who, abandoning a competent son, and taking her stridhana, unites herself with another man without the consent of her son, the son shall take the stridhana and discharge the debt. By the expression 'though competent' even an incompetent son is included. It has been shown that in case a woman abandons her son, her stridhana property should be taken by the son.

Narada: "Where a mother leaves her son and lives in dependence on another, the son shall pay having no wealth of her own, all the father's debts."(3) The meaning is that if a woman who has no wealth of her own leaves her son and lives in dependence on another, the son alone shall pay the debts incurred by her husband.

Accordingly: "But if a woman having large stridhana wealth and issue, seeks another man, he must either pay her husband's debts or reject her with her wealth and issue."(4) Sapradhana] having large (stridhana) wealth. Bhartuh] of the man who had married her. The meaning is that if he does not pay the debt he must reject her with her wealth and issue.

Katyayana: "If a woman having an infant son and large estate, betakes herself to another husband, then he to whom she

(1) Yajnavalkya, II, 51.
(2) I, Cole. Dig., 22, CCXXIV.
(3) Narada, I, 20.
(4) Ibid I, 21.

betakes herself shall pay the debt (of her husband); this is declared to be the law respecting women having infant sons. A person who had been long absent in a foreign land, one who has no kindred, an idiot, a mad man and a heretic, even, and the rest though these are alive, their debts should be paid by those who take their wives and their property." (1) The meaning is that in the case of those long absent in a foreign country, etc., (the debts should be paid) by those who take their wives and property.

Here ends the chapter of the Vivadaratnakara on the payment of debts.

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Collector of Dinagepur v. Girja Nath Roy, I. L. R., 25 C. 346. The point in this case is one of considerable difficulty. The question was whether the owner of a ferry who was also the owner of the adjoining land which was taken under the Land Acquisition Act for the purposes of a bridge was entitled to claim compensation for the damage to the ferry. Cl. 4 of S. 23 provides that "the Court shall take into consideration the damage sustained by the person interested at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner or his earnings." Here the learned Judges hold that the word *acquisition* includes the purpose for which the land is acquired. In a somewhat similar case *Hopkins* v. *Great Northern Railway Company*, 2, Q. B., 224, the Court of Appeal refused to award compensation on the ground that it was not the taking of the land or the construction of the bridge that caused the damage but the user; and such user was not specified as liable to be taken into account. Moreover, *Mellish*, L. J., pointed out that no action in tort would lie against a private person in such a case and there was no reason why a company should be made liable. S. 24, Cl. 3, specially points out that the Court should not take into consideration any damage sustained which if caused by a private person would not render such person liable to a suit. This rule would seem to be an enactment on the principle laid stress on by *Lord Justice Mellish*. But looking at clauses 5 and 6 of S. 24, there seems to be ground for the opinion of the learned Judges in the case under notice that the use to which the land may be put in case it depreciates the

(1) I, Cole. Dig., 226, CCXXVII and VIII.

value of other land may be taken into consideration. This is not enacted in terms and unless such depreciation is actionable in the case of a private person, Cl. 3 would preclude the depreciation being taken into consideration. There is force, no doubt, in the argument that the word *acquisition* in Cl. 4 should include the purpose also, for the acquisition by itself does not generally injuriously affect other property. But we think that this is not necessarily the case; for it is well conceivable that the ownership of another person in the land separated may in many cases injuriously affect the land retained. Furthermore, the damage to be taken into consideration in Cl. 4 is the damage sustained at the time of the Collector's taking possession of the land. Supposing the bridge was not constructed for many years, no damage would accrue to the ferry. The decision in *Cowper Essex* v. *Acton Local Board,* L. R., 14 A. C., 153, of the House of Lords does not affect the present case. We are inclined to think that the Court has placed a much more liberal construction upon the language of Clause 4 of S. 23 than it warrants. Sufficient attention, we think, has not been paid to Cl. 3 of S. 24.

Jagannath Prasad Gupta *v.* Runjit Singh, I. L. R., 25 C. 354. We are glad that the somewhat extraordinary decision of *Shephard* and *Davies,* J. J., in *Parvathi Ammal* v. *Saminatha Gurukal,* I. L. R., 20 M. 40, has been dissented from by the Calcutta High Court. The decision of the Madras High Court came upon us by surprise, and we hope, it will not be followed. Some observations of the Privy Council in previous cases have been deemed to warrant the startling proposition that unless a person sues to establish an adoption within six years from the date of it, he loses the chance altogether. The law lays down a period of twelve years for the recovery of immoveable property and there is no suggestion that that period has been cut down, because the person suing to recover it is an adopted son whose adoption is disputed. Until the Privy Council expressly decides this, there is no reason why such an obviously unsound proposition should be accepted as good law.

The case under notice lays down another important rule that the management of an endowment reverts to the heirs of a founder on failure of the heirs of trustees and on default of appointment of a successor as provided in the trust-deed.

Saral Chand Mitter *v.* Mohun Bibi, I. L. R., 25 C. 371. The question dealt with in this case is one of very considerable importance—whether a contract by a minor is void or voidable if another person has

acted upon the representation by the minor that he was of age and has parted with money or done any other act upon the faith of such representation. The mere fact of the minor contracting cannot be taken to amount to a representation that he was of age; or that it was a ground for estoppel, for the other party may not have relied upon it. The broad proposition above enunciated is merely the rule of estoppel contained in S. 115 of the Indian Evidence Act and is accepted by the Bombay High Court in *Ganesh Lala* v. *Bapu*, I. L. R., 21 B. 198, as applicable to a cantract by a minor. In the case of *Dhanmull* v. *Ram Chunder Ghose*, I. L. R., 24 C. 265, three Judges of the Calcutta High Court consider the rule of estoppel inapplicable to the case of a minor and would not give a decree for money against the minor even though upon the faith of a fraudulent representation by the minor the contract was entered into. S. 115, however, does not require fraud on the part of the person making the representation to justify the application of the rule of estoppel; and this has been so expressly ruled by the Privy Council, *Sarad Chunder* v. *Gopal Chunder*, I. L. R., 20 C., 299. In the case under notice, where there was a fraudulent representation by the minor that he was over age and a mortgage deed was executed, a mortgage decree was granted by the Court. The Chief Justice seems also to throw doubt upon the correctness of the ruling in the earlier case that no personal decree could be granted. There is a largen umber of decisions cited justifying the mortgage decree on the ground of fraud; and apparently this would not be questioned by the Judges who decided the earlier Calcutta case in I. L. R., 24 C., 265. But the question remains whether the rule of estoppel will apply when the representation is innocent. And there is also the further question whether a personal decree could be granted assuming the mis-representation to be fraudulent. We are unable to see why a personal decree should not be granted if a mortgage decree could. The decision in *Nelson* v. *Stocker*, 4 De. Gex. & J. 458, would seem to justify Chief Justice *Maclean* in his doubts as to the correctness of the case in 24 Calcutta. Probably, the sound rule will be to do away with a number of refinements and to hold that the rule of estoppel in S. 115 applies to the case of minors, unless there be any over-riding principle. But should the rule of estoppel be applied in matters of status which are public law, Can a person become a husband or wife by estoppel? If not, how can one be a major by estoppel? It has been held that one may be an adopted son by estoppel. But the question has nowhere been discussed on this broad ground.

Dost Muhammad Khan *v.* **Syed Begam**, I. L. R., 20. A., 81. Explanation 2 to section 13, C. P. C., lays down an important principle. If a ground of defence has not been alleged in a previous suit, it is not open to the party who should have alleged it to rely upon it in a fresh suit, all the other conditions as to parties and cause of action being the same. This principle is applicable to a suit for

partition by some of the heirs of a deceased Mahomedan, and the defendants having failed to claim a reduction for a dower-debt, are precluded from claiming it in a new suit by them. And this rule of *res-judicata* is applicable as between co-defendants also; for in a partition suit where the share of each has been ascertained, the contention which each is entitled to set up should be deemed to have been set up. The more difficult words in that explanation are "ground of attack." In an early Madras case, they received an interpretation to mean ground of attack to the defendant's pleas and not causes of action against the defendant. But the recent decision of the Privy Council in *Kameswar Parshad* v. *Rajkumari Ruttun Koer*, 19 I. A., 234, has over-ruled this limitation. The exact scope of this Privy Council ruling has not yet been settled. Though the Madras High Court has followed it to its full consequences, two Division Benches of the Madras High Court have practically differed as to its scope: see *Subrahmania Chetti* v. *Authinarayanan*, 7 M. L. J. Rep., 288; *Arunachalam Chetty* v. *Meyyappa Chetty*, I. L. R., 21 M., 91.

Sheorania v. Bharat Singh, I. L. R., 20 A., 90. There is considerable force in the arguments of the learned Judges in this case, but none of the circumstances referred to is sufficient to preclude an amendment of the plaint; and whether he is a minor or a major the plaintiff is the same. Verification may be made by a person acquainted with the facts and as regards the signature to the vakalat and the plaint, the defect is not such as could not be cured by the amendment. We are disposed to agree with the more lenient view taken by the Calcutta High Court in *Taqui Jan* v. *Obaid-ulla*, I. L. R., 21 C. 866.

Aman Singh v. Narain Singh, I. L. R., 20 A. 98. We doubt the correctness of this decision. Chief Justice *Edge* and *Banerji*, J., are of opinion that if a compromise decree is passed without previous leave to enter into a compromise having been given to the guardian of a minor party to the suit, such minor cannot sue to set aside the decree, assuming the compromise to have been beneficial, on the mere ground of want of sanction. They cite no authority in support of this view and the language of the section that the compromise shall be voidable against all parties other than the minor is obviously against that view. This provision is not limited to proceedings by way of review or appeal and a separate suit to set aside the decree on the ground of want of sanction lies. It was so held in a recent case in Madras, *Arunachalam Chetty* v. *Meyyappa Chetty*, I. L. R., 21 M. 91; and a number of earlier cases to the same effect are collected in Mr. O. Kineally's notes to S. 462.

Sri Gopal v. Prithi Singh, I. L. R., 20 A. 110. The holder of certain prior mortgages, sued as a defendant, failed to plead some of

them in answer to the plaintiff's suit. In a subsequent suit by him for sale, the Court held that he was disentitled to rely upon those mortgages not pleaded under explanation ii to S. 13. It is a matter which he ought to have made a ground of defence. There would be nothing to preclude his asking for a personal decree, for his right to a personal decree would have been no ground of defence in the prior suit. As the prior mortgagee was entitled to a suit upon the sale being made subject to his mortgage or if the property was sold free of all mortgages that the prior mortgagees should be paid first out of the sale proceeds, the existence of the prior mortgages was a legitimate ground of defence, the failure to plead which was rightly held to disentitle prior mortgagee from suing for sale.

Fazal Husen v. Raj Bahadur, I. L. R., 20 A., 124. When an order of abatement of an appeal is passed by an appellate court, the appellant having died, the date from which limitation runs for execution is held to be the date of the original decree and not the date of the order of abatement. Cl. 2 of the 3rd column of Art. 179. specifies the date of the final decree or order of the appellate court as the starting point for the execution of a decree or order. It may be the words '*decree*' and '*order*' in the 3rd column may refer respectively to the words '*decree*' and '*order*' in the 1st column. But we think the more correct view is to hold that the final order of the appellate court is the starting point for the execution of a decree also. It has been so held in the cases of orders of withdrawal of the appeal: *Wazir Mahton* v. *Lulit Sing*, I. L. R., 9 C., 100; *Akshoy Kumar Nundi* v. *Chunder Mohun Chathati*, I. L. R., 16 C., 250. The Madras High Court has also taken the same view. The question has been raised whether there is an appeal at all when none lies by law or the memorandum of appeal is insufficiently stamped. Having regard to the language of the Court Fees Act that the memorandum of appeal shall have no validity whatever in case of insufficient stamp, the more technical view may be that there is no appeal in such a case and hence the date of the original decree is the starting point. But a more liberal view has prevailed in Calcutta and even where strictly no appeal lies, it has been held that the date of the appellate decree or order is the starting point. The order of abatement is the final order of the appellate court, and prior to that there was an appeal properly pending. There seems to be no reason why that should not be taken as the starting point for an application for execution.

Sadiq Husain v. Lalta Prasad, I. L. R., 20 A., 139. This appears to us to be rather a hard case and we doubt whether the conclusion to which the court came was inevitable. A decree of the High Court was

assigned and the assignee executed and realised what was due to him. The judgment-debtor appealed to the Privy Council and the High Court's decree was reversed. But the assignee was not made a party to the appeal, and when the successful appellant in the Privy Council applied for restitution, the High Court held there was no provision for ordering restitution against the assignee. It must be confessed that there is no specific provision in the Code itself for restitution in the case of a Privy Council decree. And it has been held that the Court has an inherent jurisdiction to order restitution. *Rodgers v. Comptoir D'escompte de Paris*, L. R., 3 P. C. 465, and *Gooroo Doss Roy* v. *Stephens*, 21 W. R., 195, S. 610, of the Civil Procedure Code directs that the courts here should execute the order of the Privy Council in accordance with the rules relating to the execution of decrees. And this may be done against the representatives of parties, restitution being also execution, it will be an order against the representative. The assignee of the decree-holder in the High Court is his representative and it seems to us just that execution should be had against him. The appellant before the Privy Council was not bound to make the assignee party to the appeal. The High Court's decree having been set aside, the assignee is bound to refund in execution by way of restitution. To hold otherwise would be denying relief to the successful man altogether; for S. 244 may bar a separate suit. The question is not free from difficulty, but we are inclined to think the High Court's view is open to question.

SUMMARY OF RECENT CASES.

Jains settled in Belgaum, applicability to Hindu Law to—Jain of Dassa Porwad caste governed by general Hindu Law—Hindu Law, general, applies to the three regenerate classes—Hindus, division of, into four classes—Vaishyas—Hindus carrying their law with them when settling out of their country—Illegitimate sons, rights of, amongst the three regenerate classes and amongst Sudras, Sudras, law as to.

Bapuchand *v.* Govind.

A Jain of the Dassa Porwad caste, settled in the Belgaum District from Gujerath, is governed by the general Hindu Law applicable to the three regenerate castes, *viz.*, Brahmins, Kshatriyas and Vaishyas, being not a Sudra, but a Vaishya by origin, and as such he carries his law with him from Gujerath to the Belgaum District. Under the ordinary Hindu Law, which applies to the three superior castes, to the third of which division the Jains belong, illegitimate sons do not inherit, but are entitled to maintenance only.

Illegitimate sons of Sudras are no doubt their heirs, taking with legitimate sons, daughters and daughters' sons only half the share of the legitimate sons. It does not, however, follow that in the absence of the latter they would take the whole estate to the exclusion of the widow :—*Printed Judgments of the B. H. C.* for 1898, p. 181.

Partition, suit for, limitation as to, when part of estate in exclusive possession of vendee of co-parcener for more than 12 *years—Alienee from co-parcener, title of—Co-parcener, alienation by—Possession, exclusive of alienee of co-parcener—Undivided estate—Joint family property, partition of—Limitation Act* XV *of* 1877, *Schedule II, Articles* 126, 127 *and* 144.

Bhawrao bin Mahimajirao Mhadik *v.* Bakhmin kom Raghojirao bin Tulajirao Kadam.

When some members of a joint Hindu family sell or mortgage to their respective alienees certain defined and distinct portions of the estate which have been in their exclusive possession and put the latter in possession of the same, the possession of the alienees becomes adverse to their respective alienor and their co-parceners also. It does not affect the question even if the alienees know that the lands they have purchased formed part of an undivided estate. A person coming in under a title which he knows to be defective, or even a trespasser is not by reason of his knowledge, deprived of the benefit of the law of limitation. In such a case Article 144 of the Limitation Act applies and a claim for partition of such lands, which have been in the possession of vendees and mortgagees and holders under alleged purchases, for more than 12 years, is barred by limitation. Article 127 which deals with the limitation applicable to joint family property does not apply to such a case.

Adverse possession depends upon the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested whether in a single person or many jointly :—*Printed Judgments of the B. H. C.* for 1898, p. 170.

Hindu Law as to adoption by widow of a predeceased son as against a widow of deceased Hindu—Adoption by widow of predeceased son, so as to deprive widow of deceased of her rights as heir—Widow of predeceased son, right of, to adopt—Authority to adopt—Right to adopt by older co-widow as against younger co-widow—Co-widows, adoption by—Rule as to adopted son being younger than adopting mother—Difference of age, rule as to, in adoption.

Gopal Balkrishna Kenjale *v.* Vishnu Raghunath Kenjale.

As between the daughter-in-law, being the widow of an only predeceased son living in union with his father at the time of his death,

and the mother-in-law, the widow of a deceased Hindu, the right of the latter to adopt is in every way superior, and the former has no independent right to adopt without the sanction of her father-in-law. The estate vests in the mother-in-law as heir, and unless she chooses to divest herself of this right, no act of the daughter-in-law could divest her of her rights as sole heir. The case of a younger co-widow is an exception to this rule, for the elder widow may by subsequent adoption divest her of her rights in the estate. Unless prohibited expressly or by implication, a widow in this Presidency has an implied authority to adopt. This cannot be said of the daughter-in-law, the widow of a predeceased son, who must be specially authorised by the father-in-law to make a valid adoption binding against his heirs.

The rule prescribing a difference of age in favour of the adopting mother must be only regarded as a directory rule, and not a command, the infraction of which invalidates the adoption :—*Printed Judgments of the B. H. C.* for 1898, p. 175.

Admissions by minor made in possessory suit, admissibility of, in a suit for possession brought by him after majority—Minor, admissions of—Evidence Act I of 1872, *Sections* 21, 58 *and* 65 *(b)—Evidence—Secondary evidence.*

Balaji Vasudev Habbu *v.* Rudrapa bin Mudkapa.

In a suit for possession of land by A, his admission in a possessory suit when he was a minor of its sale to the defendant by an unregistered document which requires registration does not come within the meaning of Section 65(*b*) of the Evidence Act. It can only be got in under Section 21 of the Evidence Act when ground is made for the admission of secondary evidence. A not claiming through his mother, similar admissions made by her in such suit are not in any event admissible against him. A's admission as to the effect of the document made in the possessory suit before the Mamlatdar is not sufficient to dispense with proof of the contents of the document under Section 58 of the Evidence Act :—*Printed Judgments of the B. H. C.* for 1898, p. 179.

Gift, by Hindu, validity of, without delivery of possession—Validity of Hindu gift—Transfer of Property Act IV of 1882, *Sections* 123 *and* 127.

Bai Rambai, *v.* Bai Mani.

The Hindu rule of law that delivery of possession is essential to complete a gift has been abrogated by Sections 123 and 127 of the Transfer of Property Act :—*Printed Judgments of the B. H. C.*, p. 147.

Hindu minor—Minor, release by—Release by Hindu minor of his interest in family property in favour of his son, validity of, as against creditors—Family arrangement—Colourable transaction—Benami transaction—Statute of Elizabeth as to voluntary conveyance—Contracts by infants whether void or voidable—Ratification of contracts by minors—Consideration—Indian Evidence Act, I of 1872, Sections 21 and 38—Contcrat Act, IX of 1872, Sections 2, sub-sections (g) and (h), 10, 11, 247 and 248—Transfer of Property Act, IV of 1882, Section 197—Indian Trusts Act, II of 1882, Section 7.

Sadashiv Vaman Dhamankar *v.* Trimbak Divakar Karandekar.

In 1887 W, an adopted son, executed an instrument styled a release in favour of his minor son S represented by his aunt, the adoptive sister of W releasing the whole of the immoveable and moveable property of W which had descended to him from his adoptive father in favour of S. W was in law a minor when he executed the release. A creditor of W sued him after attaining majority seeking a declaration that certain property which he had attached was the property of W. *Held* in second appeal that the execution of the deed being admitted and it having been registered, the burden of proving that it was invalid lay upon the plaintiff, who could only succeed by showing that the release was made in favour of S with the intent of actually conveying the share of W to S but with the further intent to delay, hinder, and defraud W's creditors within the meaning of the Statute of Elizabeth. In India where the *benami* system is common there may be a sham conveyance which though registered and delivered to the grantee not being intended to pass the property, but merely to be used as a blind to deceive creditors or others, conveyed no estate to the nominal grantee. *Held* that the circumstances in this case that the then existing debts of W were all paid off by S at or about the time when the release was executed and as part of the same transaction; that the release was registered and publicly notified throughout the District, that its openly avowed object expressed in the instrument itself was to protect the ancestral estate from the consequences of W's imprudence and extravagant habits, precluded the idea that *if intended to be operative between the parties to it as a release*, it was executed for the purpose of defeating, hindering or defrauding creditors. *Held* also that the evidence given by W in certain certificate proceedings instituted by him after attaining majority must be left out of consideration in this case as not being evidence under Section 38 of the Evidence Act, and being in the nature of admissions in W's own interest, could not be used in his favour nor in

favour of the plaintiff who claimed through him. Evidence Act, Section 21. That the release in question could be supported as a family arrangement. That the circumstance that a voluntary family settlement like the one in question was without consideration, other than the covenant to provide W with maintenance while he lived in the family house and Rs. 15 per month if he was not satisfied with the maintenance provided for him, did not afford any evidence that it was not the intention of W and S that the release should be acted upon. That apart from the Contract Act a release by an infant in the nature of a conveyance would be voidable and not void. That it was open to question whether the Contract Act (apart from the Transfer of Property Act which did not apply to the case) affected the question, which appeared it did not. That there was evidence in the case to hold that W did not raitfy the release :—*Printed Judgments of the B. H. C.* for 1898, p. 149.

Partition, suit for, by purchaser, will not entitle defendants who do not so claim, to have their shares divided off and allotted to them or the Court to decree general partition—General partition, Court cannot decree if defendants do not ask, in suit for partition of his share by purchaser—Second appeal—Purchaser, suit by, for partition of his share.

Murarrao Zimajirao Dalvi *v.* Sitaram Keshav Pendse.

Plaintiff sued as a purchaser to obtain by partition the share he had purchased, valuing his claim at the value of that share and paying Court-fees on it. The defendants who represented the family did not claim their shares and ask for them to be allotted to them. *Held* that though it was no doubt open for each and every one of the defendants to have asked to have his share divided off and allotted to him, in which case he would have had to pay Court-fees according to his claim, it was not compulsory on him to have done so, still less the Court was bound, in the absence of any such request, to have determined what was the share of each of the defendants and to have allotted him that share and compelled him to take it by making a general partition. The Court in second appeal refused in such a case to accede to the prayer of some of the defendants, who did not appear in the Court of First Instance, to have the shares thus found as theirs to be divided off and allotted to them :—*Printed Judgments of the B. H. C.* for 1898, p. 132.

Court-fees, payment of, by defendant, to be given his share in partition suit—Mussulmans, suit by, for partition of joint inheritance, not distinguishable in this Presidency from partition suit by Hindus—Partition suit—Inheritance—Administration-suit, payment of Court-fees, in—Relief to defendant, on payment of Court-fees.

Abdul Kadar *v.* Bapubhai Valad Sheik Inam.

In a suit by Mussulmans for partition of an inheritance, the joint property of the parties, the lower Court refused to give one of the defendants, though he asked for it, his share which was found and admitted to be a third. The First Court refused because the Court-fee paid was only sufficient to cover the plaintiffs' one-third share in the property, and the lower appellate Court on the ground that this was not a suit for partition of joint-family as known to Hindu law. The High Court in second appeal holding that in this Presidency a suit for partition of an inheritance by Mussulmans is hardly distinguishable from a partition suit by Hindus, and the First Court having declared the property to be the joint property of the parties, the principles of an ordinary administration-suit ought at any rate to be applied to it awarded the defendant his share to be ascertained and given to him in execution on payment by him of the necessary Court-fees;—*Printed Judgments of the B. H. C.* for 1898, p. 135.

Landlord and tenant.—Covenant running with reversion—Specific devisee and general estate.

Eccles v. Mills, [1898—A. C. 360.]

The question in this case was whether a sum of money recovered by a lessee from the executors of his lessor as compensation for the non-fulfilment of a certain covenant in the lease ought to have been charged against the specific devisees of the farm or should be paid out of the general estate of the lessor. J demised to B a farm of 4,000 acres known as M, for fourteen years. The lease contained a covenant by the lessor for himself his heirs executors, &c., in the following words: "The lessor, his heirs or assigns will, at his or their own expense, within a year completely finish laying down in good English grass thousand acres of the farm." The covenant was accompanied by the following declaration at the end of the lease. "It is hereby declared that there shall not be implied in this lease, any covenant or provision whatever on the part

of either of the parties thereto." Z died without performing the covenant within the year, and by his will, he divided his property among his children. The farm M. had come to the appellants under a voluntary conveyance and the respondents represented the interest in the testater's residuary estate. At the end of the year, B claimed and got compensation from the executors for breach of the covenant in question. A dispute then arose as to the liability of the owners of the reversion in M to pay this amount. Their Lordships of the Privy Council reversing the decisions of the courts below, held that the covenant was qualified and controlled by the declaration, that, it was not in itself a charge on the reversion and not being one incidental to the relation of landlord and tenant, liability for breach thereof properly fell to be borne by the general estate of the deceased lessor.

Covenants running with reversions are of two kinds: (1) where the covenant is a burden or a charge on the reversion; (2) where the covenant is in its nature incidental to the relation of landlord and tenant. At common law no covenant ran with the reversion until modified by a statute of Henry VIII which provided that lessees shall have a like action against alienees of the reversion for any condition or covenant expressed in the lease. The statute was passed for the protection of tenants and gives the lessee a remedy against the lessor's assignees of the reversion in addition to the one that he possesses against the lessor's general estate. Further, of these covenants that run with the reversion the burden of those that are incident to the relation of landlord and tenant should be borne by the devisee, as between him and the testator's estate. We thus see that (1) if the covenant was a charge on the reversion, the specific devisee must always bear the burden of it; (2) if it was not a charge but was only a covenant running with the reversion and incidental to the relation of landlord and tenant the devisee has ultimately to bear the burden of it, though the lessee may proceed against the specific devisee as well as against the general estate; and (3) if it was neither a charge nor one connected with the relation of landlord and tenant the specific devisee was not liable for breach of it, the general estate being alone responsible. Their Lordships held in this case that the covenant in question did not fall under either of the first two headings above mentioned, but was a thing to be done preparatory to the complete establishment of the relation of landlord and tenant and that the burden of such a covenant should, therefore, be borne by his general estate rather than by the specific devisees.

Vendor and purchaser.—Conditions of sale—Defective title.

In-re **Deighton and Harris's Contract,** [1898—1 Ch. 458 C. A.]

The mortgagee of certain leasehold premises contracted to sell them by a deed of sale. The deed of sale contained a provision to the effect that if the purchaser should make any objection or requisition whatsoever "as to the title particulars, conditions or any other matter or thing relating or incidental to the sale, which the vendor is unable or unwilling to comply with the vendor. . . . . the vendor shall have full power to annul the sale." It turned out on the investigation of the title by the purchaser that the vendor was holding by a sub-demise the legal estate in which was outstanding in another sub-mortgagee said to have been paid off. The purchaser, therefore, insisted that the person having the legal estate should join the conveyance. The vendor being unwilling to comply with the requisitions of the purchaser, it was held by the Court of Appeal reversing the decision of *Kekewich*, J., that under the condition above mentioned the vendor was entitled to annul the sale. The condition in their opinion extending to a matter of conveyance as well of title. On the purchaser relying on the case of *Bowman* v. *Hyland*, 8 ch. D. 588, their Lordships distinguished that case as one in which the vendor had no title whatever and held that the ordinary conditions of sale giving the vendor a power of recision applies only where he has some title and not where he has none.

Specific performance.—Laches—Return of Deposit—Lien for Deposit.

Levy v. **Stogdon,** [1898—I Ch. 478. *per Stirling J.*]

Where a deposit is made by a purchaser the deposit is not merely a part payment of the purchase money but constitutes a security for the completion of the purchase so that if the purchaser fails to perform his part the vendor may retain it. It is sometimes said that facts which will induce a Court to refuse specific performance to a purchaser would entitle the vendor to retain the deposit—but the rule more accurately stated seems to be that, in order to enable the vendor to retain his deposit there must be acts on the part of the purchaser which not only amount to delay or other cause sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract. On the other hand, if the vendor fails to perform the contract on his part the latter may, in the absence of a stipulation to the contrary recover the deposit from the vendor and further has a lien on the subject matter of the contract.

In 1886 A. a vendor contracted to sell a contingent reversionary interest free from incumbrances, and the purchaser paid a deposit on the purchase money. The reversion, however, proved to be incumbered and before the incumbrances were discharged, the vendor was adjudicated a bankrupt in 1888. In the same year the bankruptcy was annulled and under a composition deed the whole of his property was sold by his trustee. In 1891, the purchaser also became a bankrupt having previously sold his interest under the contract to P. who subsequently assigned it to B. In 1895, the reversion fell into possession and B. shortly afterwards claimed specific performance, or in the alternative a lien for the deposit paid by the purchaser. *Stirling* J. held: (1) that the delay was a bar to any claim for specific performance: (2) that B. had a lien for the deposit and that he can enforce his lien as no statute of limitations apply to the case.

Abandonment of quantum meruit.

Sumpter v. Hedges, [1898—1 Q. B. 673, C. A.]

In this case the plaintiff a builder had contracted with the defendant to build upon the defendant's land two houses and stables for a lump sum of £ 565. After the plaintiff did part of the work and had received the payment of part of the price, he informed the defendant that he had no money and was not willing to go on with the work and thereby virtually abandoned the contract. The defendant thereupon finished the building on his own account using for that purpose certain building materials which the plaintiff had left on the ground. The plaintiff now sued for work done and for materials supplied by him. The Court of Appeal held following *Munro*, v. *Butt*, (1858 8. E. & B. 738, that the plaintiff could not recover.

The law is, that, where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered. There are, however, cases where money can be recovered for work done as on a *quantum meruit*, but in order that that may be so, there must be evidence of a fresh contract to pay for the work already done. If in this case the plaintiff had merely broken his contract in some way so as not to give the defendant the right to treat him as having abandoned the contract and the defendant had then proceeded to finish the work himself the plaintiff would be entitled to recover on a *quantum meruit*. Further there are cases in which though the plaintiff has abandoned the performance of a contract it is possible for him to raise the inference of a new contract to pay for the work done on a *quantum meruit* from

the defendant's having taken the benefit of that. work. But in order that that may be done the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. It is only in such cases that the inference of a new contract may be made from the defendant's taking the benefit of the work done; but where there is no such option as in the case now under consideration one must look to other facts than the mere taking of the benefit of the work in order to ground the inference of a new contract.

Covenant in lease—Meaning of the term assigns.

Bryant v. Hancock & Co., Limited, [1898—I, Q. B. 716 C. A.]

The plaintiff demised by lease to J. B., and his assigns a hotel for a term of twenty-one years. The lease contained a covenant that neither the lessee nor his assigns, executors or administrators shall wilfully do or suffer any act or thing which may be a breach of the regulations established by law for the conduct of licensed public houses or be a reasonable ground for withdrawing or withholding the licenses for the sale of spirituous liquors. After some years J. B., assigned the residue of the term to the defendants who sublet the premises to one Mrs. E. for a short part of the term vested in them. Mrs. E. was convicted by the Magistrates for having on one occasion permitted drunkenness on the premises and in consequence the justices refused to regrant the licenses in respect of the premises. The plaintiff thereupon sued the defendants for damages for breach of the covenant and at the trial of the suit before *Lawrence*, J., the plaintiff obtained a decree. On appeal, however, the Court of Appeal held, reversing the decision of the lower Court, that the term 'assigns' did not include an under-lessee and that the defendants were not liable for things done by the under-lessee.

An assurance for a period less than the whole term is an underlease and not an assignment. (*Ottee v. Richardson* 1853, 7. Ex. 143.); an assurance purporting to be an underlease, if it comprises the whole term, may be an assignment: [*Langford v. Selmes*, 1857, 3. K. and J. p. 220 *Beardman* v. *Wilson*, L. R., 4 C. P., 57]. A covenant not to assign is not broken by the granting of an under-lease. [*Crusoe v. Bugby*, 1, 771, 3, Wils. 234].

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications :—

Un-reported Decisions of the Privy Council from 1876—1896, compiled by Baldeva Ram Dave Bar.-at-Law, Allahabad, printed and published by the Manager, Indian Press, Allahabad.

The Albany Law Journal for June and July (*in exchange*).

The Calcutta Weekly Notes for July (*in exchange*).

The Allahabad Weekly Notes for July (*in exchange*).

The Green Bag for July (*in exchange*).

The Canadian Law Times for June (*in exchange*).

The Canada Law Journal for June (*in exchange*).

The Educational Review for June and July (*in exchange*).

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Value of Dissenting Opinions :—The discussion of the value and expediency of dissenting opinions is by no means ended yet. Indeed, such discussion seems to spring up perennially, showing at least a very decided and significant amount of vitality and energy on the part of those who oppose on principle the policy of permitting the publication of the views of the minority of a legal tribunal on a given question or series of questions. Some trenchant remarks have been made on both sides of the controversy. Perhaps the strongest argument against dissenting opinions is that based upon the principle that a decision should be that of the court and not of the judges as individuals; that it is a maxim of the law that it is to the interest of the public that there should be an end to litigation, in which view it is to the advantage of the public that when a question is settled by the highest tribunal it should remain settled for all time; that a dissenting opinion, if well written, impresses not only the particular litigant, but all who read it, with the idea that injustice has been done by the courts, thus weakening them in the popular esteem. While there is more or less force and truth in these views, we most decidedly dissent from the proposition that "a question once settled should remain settled for-ever." That depends, or ought to depend, upon whether it is settled right. It has been truly said by our contemporary, the New York Law Journal, that "it can do no real injury, and may often be productive of substantial good, for the courts to furnish the reasons for dissents. If they are weak and unconvincing,

they only serve to strengthen the authority of the prevailing opinion. If, on the other hand, the weight of argument is with the dissenters, the dissenting opinion will have most important bearing upon future cases involving the same or closely similar issues." We may add that in our opinion the publication of dissenting opinions not infrequently prevents injustice being done by showing to the profession and to the public that the majority is wrong. We have in mind several recent instances in which, according to the consensus of opinion of the members of the profession, the dissenting opinions are right and those of the majority clearly wrong. It is evident that without the publication of the dissent and the reasons therefor the errors of the majority would have gone unexposed at least for a much longer time. Thus, in our view, the publication of dissenting opinions, so far from keeping the law unsettled, tends directly to settle it, and to settle it right. True it is that upon the respect of the people for the courts depends to a large extent the very life of the Republic; but the idea that even our judges are infallible has long since gone into eclipse, together with that other played-out notion that the king can do no wrong. While majorities are doubtless more often right than wrong, minorities have rights which majorities are bound to respect; and among these rights is or ought to be the privilege of making known to the world the reasons for the faith that is in them. Thus the precious spark of truth will be struck out on the anvil of free discussion.

Dissenting opinions are clearly in line with an untrammelled press, and thoroughly in accordance with the genius of our free institutions:—*The Albany Law Journal.*

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An Innovation in Jurisprudence.—For the introduction of an important innovation in jurisprudence we are indebted to the Supreme Court of the State of Washington. It is quite within the possibilities that that breezy section of our vast country, sometimes referred to as "wild and woolly," may be able to teach us of the "effete" east something of value in legal methods and procedure. The incident referred to occurred in connection with the determination by the Supreme Court of Washington of the constitutional validity of legislation prohibiting "gold clauses" in contracts. A provision in a statue relating to debtors and creditors declared that a contract stipulating for payment in gold coin should not be specifically enforced by the courts of the State, but that the debt in such cases "might be fully satisfied by and with any kind of lawful money or currency of the United States." Recognizing the great importance of the questions

involved, and being extremely anxious to decide them right, the members of the Supreme Court hit upon the plan of supplementing the able and elaborate arguments of counsel on opposite sides by inviting the leading lawyers of the State who were not professionally connected with the case to submit briefs setting forth their several opinions and arguments. This method of eliciting the honest and impartial views of the best legal talent of the commonwealth with the view of assisting the court to reach a right conclusion, we believe is unprecedented, but we see no reason why it should not be resorted to by the courts of other States in cases of equal importance. Such procedure, besides exhibiting a commendable desire on the part of the court to get right and to do right, seems well calculated to throw all light possible upon a given case, and on the assumption that in the multiplicity of counsel there is wisdom it should prove valuable. It may be added, incidentally, that the decision in the case referred to was adverse to the so-called Gold Law, the court basing its opinion upon the conviction that the statute was an attempt to legislate on a subject belonging exclusively to the Federal government. This is sound and probably sufficient, but a conclusion adverse to the law might also have been reached on the ground of unwarrantable interference with, and restriction of, the freedom of contract—something which even congress would have no power to do. It would probably be held that individuals might make contracts providing for payments in any form of currency, and since no private stipulation can raise or lower the value of any kind of money, a clause calling for payment in gold would seem to be clearly legal.—*The Albany Law Journal.*

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Will a so-called spiritualistic medium be justified in assaulting one who interrupts his seance? is a question which the Supreme Court of Michigan was called upon to decide recently, in the case of *People* v. *Hughes,* reported in 74 N. W. Rep. 309. It appears that the complaining witness had been invited by a "medium"—and he seems to have been only a medium sort of medium—to go to his house to investigate his methods. The lights were turned out and the "dark circle" formed in the old, familiar way. The medium was tied to a chair, and his visitor sat behind him. The chair appearing to move, the visitor put out his foot to touch it. Then he lighted some matches, which not only frightened away the spirits, but caused the medium's anger to rise to such a degree that he immediately fell upon the luckless and indiscreet visitor, whom he threw to the floor and choked. The Court, after wrestling with the problem for a while, held that in spite of the rule

allowing a householder to eject a guest who misbehaves himself, the medium had no right to make an assault upon a visitor, and a conviction of assault and battery was sustained.—*The Albany Law Journal.*

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Proximate Cause of Accident.—An important and interesting discussion of the question of proximate cause of accident is contained in the prevailing and dissenting opinions of the New York Supreme Court, Appellate Division, First Department, in the recent case of *Lawrence E. Story, Admr., etc.* v. *The City of New York.* The plaintiff brought the action to recover damages for the death of his son Joseph, aged eight years, who was run over by a butcher's cart in East One Hundred and Tenth Street. The liability was predicated upon the presence of a mound of earth six or seven feet high in the street, which plaintiff claimed so obstructed the view of the child and the driver of the cart that they could not see each other. This mound consisted of earth taken from an excavation in front of the premises No. 220, and, as alleged in the complaint, was thrown from the excavation into the street, and negligently allowed to remain there, and had so remained as alleged for two weeks prior to the date of the accident. On the trial the case was dismissed before any evidence had been taken, and the judgment of dismissal has now been affirmed by the Appellate Division, in an opinion by Justice O'Brien. According to the plaintiff's allegation, the boy was attending a school which was fifty feet away from this excavation and on the same side of the street. Justice O'Brien said the city's liability rested upon the determination of the question whether the mound of earth was the proximate cause of the accident. "It is urged with much force," Justice O'Brien said, "that in the present case there were two efficient causes; one the presence of the mound of earth, which prevented the boy from seeing the horse and cart, and the other the horse and cart themselves; and that both were proximate causes of the accident. As we have already said, if the boy had tripped and fallen because of the mound, and then had been run over, this reasoning would be sound. But the mere presence of the mound, and the fact that it compelled the boy to pass around it, without the intervention of some other cause, would not have produced the accident. We must be careful to avoid confusing two things which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened. For the former a defendant may be liable; for the latter he will not. * * * The relation of the mound to the accident was that it obstructed vision; but this, as we have said, was not a fact which alone could

have injured the plaintiff, the cart intervening as an independent force and causing the injury." This opinion was concurred in by Presiding Justice Van Brunt and Justice Ingraham. Justice McLaughlin gave a dissenting opinion, which was concurred in by Justice Patterson. Justice McLaughlin said the defendant permitted the incumbrance to remain in the street, and this being an unlawful act on its part, it must be held responsible for the natural proximate consequences resulting therefrom. In their opinion, whether the death of the intestate was due to and resulted from the defendant's unlawful act was under the facts stated in the complaint and counsel's opening, a question for the jury. This view seems to us clearly the right one, and we believe the Court of Appeals will so hold when it comes to pass upon the question. The majority opinion embodies a refinement of reasoning which is very difficult to follow.—*The Albany Law Journal.*

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Rights of Passengers holding transfer tickets. The Appellate Division of the Supreme Court, sitting at Brooklyn, in the suit of John Jenkins against the Brooklyn Heights Railroad Company, laid down some important rules with reference to the rights of passengers holding transfer tickets. Jenkins, the plaintiff, received a transfer authorizing him in the usual way to take a Fulton street car at the corner of Court and Montague streets, within ten minutes of the time the transfer was issued. He was a sufferer from hernia, and was compelled, therefore, to take a car wherein he could have a seat. The first car which came along did not stop at all; the second stopped, but was so full that passengers were standing in the aisle; the third had vacant seats, and Jenkins boarded it, but the conductor, after taking up the transfer, notified him that the time limit had run out, and called his attention to the rules of the company posted in the car. He demanded a new fare, which was refused, and Jenkins was thereupon ejected from the car by a policeman acting on the orders of the conductor, and was arrested and taken to the Police Court, where he was afterward discharged. The question presented, said the court, was whether the plaintiff had a right to be in the car. It was held that he had. Section 104, chapter 676, of the Laws of 1892, provides that "every such corporation entering into such contract shall carry, or permit other party thereto to carry, between any two points * * * any passenger desiring to make one continuous trip between such points for a single fare * * * to the end that the public convenience may be promoted." This, the court said, was to be liberally construed and strictly enforced.

The railroad company could not set a time for the use of the transfer regardless of the condition of the cars. The passenger was entitled to a car in which he could ride in comfort and safety. It was dicided in the case of *Willis* v. *Long Island R. R. Co.* (34 N. Y. 670) that standing room in the passageway was not proper accommodation for passengers. That part of the car is what its name indicates—a way through the car. Each passenger has a right to insist that the way shall be kept at all times open and unobstructed. The company cannot compel a passenger to stand in a car, instead of furnishing him a seat. Individuals may waive their rights, but the fact that thousands do so every day does not justify the company in establishing rules to make them do so. If the company provided suitable cars, with sufficient room so that the passengers could have seats, there could be no doubt that the plaintiff must take the first car which came along, as the transfer provided for a continuous trip, and the good faith of the passenger would be established in that way. It was decided in the case of *Hanna* v. *Nassau Electric R. R. Co.* (16 App. Div. 137) that "a transferred passenger has not necessarily the right to board the first car that approaches on the line, regardless of whether there is accommodation for him. * * * His duty was to wait till a car approached in proper condition to receive him. If none came he could maintain his action against the company for breach of the contract to carry him."

The transfer ticket given to the plaintiff could not modify the original contract entered into the time of paying the fare, nor did the plaintiff in accepting it waive any rights which he had under the original contract, since he had to accept that or none at all. The lower court was not justified in excluding the testimony as to the arrest, transporation in a patrol wagon, and subsequent discharge of the plaintiff. If the arrest was made upon the order of the conductor it was part of the act of ejectment, and the jury should be allowed to consider it in estimating the damages which the plaintiff suffered.—*The Albany Law Journal.*

REVIEWS.

Privy Council Judgments not reported in the Indian Law Reports, compiled by Baldeva Ram Dave, and published by, *The Manager, Indian Press, Allahabad.*—We congratulate Mr. Baldeva Ram Dave for this very useful publication. There are many interesting and useful judgments of the Privy Council reported in this volume to

which the practising lawyer has no other means of access. Several of the judgments, however, deal only with questions of fact and should not have been included in this volume. The language of the head notes is not altogether happy in some places. But they represent accurately the points decided. The appendicies at the end of the volume giving cross-references to the several reports in which a particular decision may be found, are very valuable. The book is well got up and deserves to be in the hands of every practitioner.

The Madras Law Journal.

PART VIII.] AUGUST, 1898. [VOL. VIII.

WHO ARE BANDHUS.—I.

The texts of the Mitakshara on the subject are few. In chapter II, section 5, placitum 3, the author says: "Kinsmen sprung from a different family, but connected by particles of the same body are indicated by the term cognate." In chapter I, section 6, placitum 1, again, "on failure of gentiles" cognates are heirs. Cognates are of three kinds, related to the person himself, to his father or to his mother, as is declared by the following text: 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal uncle must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned his mother's cognate kindred.' And again, in pl. 2 the author says: "Here by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance: on failure of them, his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

It was at one time the current opinion that the enumeration made in the above texts of the Mitakshara was not merely illustrative but exhaustive. So much so that even the sister's son whose title is now clear and unquestionable felt the greatest difficulty in establishing his title. There are various Sudr Courts' decisions, but I would only refer to more recent cases, *i.e.*, decisions passed after the High Court was established. *Vide Doe dem Kullammal* v. *Kuppu Pillai*, 1 M. H. C. 85, *Jowahir Rahoot* v. *Mussamut Kailassoo*, 1 W. R. 74 and *Bheem Ram* v. *Huree Kishore*, 1 W. R. 359.

In the case of *Thakoorin Sahiba* v. *Mohun Lall*, 11 M. I. A., p. 386, the sister's son's claim was no doubt denied, but the case

went off on the ground of the admission of counsel as regards this point. There are other cases in which the rights of the persons whose claim it would now be impossible to deny were negatived. *Vide Choorah Monee Bose* v. *Prosonna Coomar Mitter,* 1 W. R., 43 and *Kissen Lala* v. *Javallah Prasad Lala,* 3 M. H. C. 346.

But all this is now exploded doctrine. It is now settled by the highest judicial authority that the enumeration of heirs in the Bandhus list is illustrative merely and not exhaustive.

In *Giridhari Lal Roy* v. *The Bengal Government,* 12 M. I. A. 448, their Lordships of the Privy Council observed: "The text does not purport to be an exhaustive enumeration of all *bandhus* who are capable of inheriting, nor is it cited as such, or for that purpose, by the author of the Mitakshara,—it is used simply as a proof or illustration of his proposition that there are three kinds or classes of *bandhus*; and all that he states further upon it is, the order in which the three classes take." *Vide* also *Muthuswami* v. *Sunambedu Muthukumaraswami,* 23 I. A., 83; *Ratnasubbu* v. *Ponnappa,* I. L. R., 5 M., 69; *Amrita Kumari* v. *Lakhinarayan,* 2 B. L. R. (F. B.) 28.

In some of these cases (*vide* 16 M., 23) a somewhat feeble contention was raised that the Mitakshara in citing the text of Vridha Satatapa does not purport to lay down any rule of succession, nor the order in which *bandhus* should succeed. The contention seems to be that the text of Vriddha Satatapa is not a rule of inheritance (illustrating nearness or remoteness of affinity), but only applies to *Pakshini* or pollution. No greater absurdity can be imputed to the author of the Mitakshara than this. When the text is specially mentioned in the chapter on *bandhu* succession, what else is the object of the author in mentioning it there? Some meaning should be attributed to the author. If he did not intend it to be a rule of succession, why did he introduce it at all in that chapter relating to succession?

Again placitum 3 (chapter II, section 6) places the matter beyond all doubt. It expressly says that the order of succession is as stated in the text of Vriddha Satatapa, *viz.,* the *atma-bandhus* should take first, next the *pitru-bandhus,* and then the *matru-bandhus*. It is sufficient to pass over this part of the subject by citing the observations of the Judicial Committee in *Muthuswami* v. *Muthukumaraswami,* in 23 I. A., 83: "Their Lordships do not think it

necessary to discuss the fanciful suggestion made in the Courts below, and refuted there with much care and learning to the effect that the quoted text is addressed to religious ceremonies of purification rather than to positive rules of succession. To whatever extent rules of succession may have been founded on religious observances or may now be explained by them, it is clear that fixed rules of law for succession have been established for ages, and equally clear that the Mitakshara professes to express such rules in the quoted text." (*Vide* also observations of *Muttusami Aiyar*, J.; and *Parker*, J., in *Muthuswami* v. *Muthukumaraswami*, 16 M., 23 at p. 29.

It being now uncontroverted that the texts are only illustrative not exhaustive, we have to consider the persons comprised in the class. But before we proceed to know definitely who one's *bandhus* are, and what their order of succession is, we have first to determine the signification of the term *bandhu*, as it is understood in the Mitakshara.

A passage in the Mitakshara by a side-wind gives us some though a faint idea of what a *bandhu* is. For in chapter II, section 5, pl. 3, we find what is really a definition of *bandhu*. The author, after defining what a *gotraja* is, says: "For kinsmen sprung from a different family, but connected by particles of the same body (*Colebrooke* renders it as 'connected by funeral oblations') are indicated by the term cognate (*bandhu*)." The Sanskrit passage is

Bhinnagotranām-sapindanām bandhu sabdena grahanāt.

For sapindas born of a different or separated stock or family (*lit.* split or cut as under) are indicated by the term *bandhu*.

For Bhinnagotra *sapindas* are indicated by the term '*bandhu*.'

Another reading is

Bhinnagotrajanam sapindanam bandhu, Sabdena grahanat (Saraswati Vilasa, Sec. 586, Foulkes' edition.

The word '*sapinda*' occurs in the Mitakshara in a previous *kanda* (*Achara kanda*), and it is defined there. According to the definition in *Achara kanda*, a sapinda is one who is connected by 'particles of the same body.' *Colebroke* lost sight of this, and hence fell into the error of rendering the term 'sapinda' in the above-quoted verse as 'one connected by funeral oblations.'

The Full Bench of the High Court of Calcutta in the case of *Umaid Bahadur* v. *Udoi Chand,* I. L. R. 6, C., 119, is reported to have said at pages 125 and 126: "If in verse 33, section 5, chapter 2, the author of the Mitakshara used the word *'sapinda'* in the meaning which he has given to it in the passage cited above (verses 52 and 53, Acharakanda) the translation of Mr. Colebrooke of the verse in question is not correct. Having taken great pains in accurately defining the word *'sapinda'* in the beginning of his work, and having said in clear words in the passage in question that 'one ought to know that wherever the word *sapinda* is used there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent,' it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense. It is a well-understood rule of construction amongst the authors of the Institutes of Hindu Law that the same word must be taken to have been used in one and the same sense throughout a work, unless the contrary is expressly indicated . . . . . These considerations leave no room for doubt that in verse 3, section 5, chapter II, the author of the Mitakshara has used the word *'sapinda'* not in the sense of 'connection by funeral oblations,' but of 'connection by particles of one body, as defined in Acharakanda. That this is the case is evident from the fact that some of the enumerated *bandhus* in verse 1, section 6 of chapter II, admittedly do not confer any religious benefit on the deceased, and therefore cannot be said to be connected by funeral oblations with him."

Again in the recent case of *Babu Lal* v. *Nanku Ram and another,* I. L. R., 22 C., p. 339, their Lordships *Norris* and *Bannerjee* observed "the term *'bandhu'* is defined in the Mitakshara (chapter II, section 5, ver. 3) as a *'bhinnagotra sapinda,'* that is, one sprung from a different family and connected by common corporeal particles or by consanguinity. *Colebrooke* incorrectly rendered *sapinda* as one connected by funeral oblation, but this inaccuracy in his translation was pointed out long ago, and the above rendering has been accepted as the correct one. (See *Lallubhai Bapubhai* v. *Mankuvarbai,* I. L. R., 2 B., 388; *Lallubhai Bhapubhai* v. *Cassibai,* I. L. R., 5 B., 110; and *Mayne* on Hindu Law & Usage, paras. 468, 469, 470, 471 and 472.)

Bandhus are kinsmen sprung from a different family though connected by particles of the same body. Therefore, a female must

necessarily intervene at some point or other; for otherwise they would not be of the same stock or family. When Vijnanesvara says that *bandhus* are *bhinnagotra sapindas* or *bhinna gotraja sapindas,* he uses *gotra* in the narrower sense of the term. In this narrower sense it means family (agnatic) or stock or lineage. The *gotra* in the wider sense has reference to the fact that in the case of Brahmins, there are 24 sub-divisions who are supposed to be descended from 24 great rishis (or to be traceable to 8 principal rishis). If you ask a person what his gotra is, he will say it is Bharadvāja, Kausika or Kauntinyā, &c. There are certain great rishis, and each and every Hindu sect or division will be of this or that gotra. Probably, this is due to the fact that each rishi had originally certain disciples or followers of his own. Those disciples will get other followers, and their descendants together with the subsequent followers will naturally be called as belonging to the *gotra* of that rishi, and so on. (In this latter sense it is used in Mitakshara in the chapter on marriage: Yájnavalkya, verse 53, cited in Mitakshara Acharakanda.* But whatever explanation be given to this, it is not in this sense that the word is used. For if it were used in this sense who are the *bandhus* of Sudras; Vijnanesvara says that the rule of succession he propounds is applicable to all classes and castes (*varna*). But a Sudra has no *gotra* or he is supposed to have only one gotra. Moreover, the word used is, '*bhinna gotra*' not '*usagotra.*' If the *gotra* is once separated, that is enough.

The *bandhus* are further *sapindas, i.e.,* they are connected by particles of the same body, *i.e.,* the person claiming to be a *bandhu* of the deceased must be a *sapinda* of the deceased. If he is not a *sapinda* of the deceased, *i.e.,* if there is no connection by corporal particles then surely he cannot claim to succeed as a *bandhu.* We must, therefore, now consider what is meant by '*a sapinda.*'

Sapindaship, as has been observed already, is not defined by the author of the Mitakshara in the Vyavaharakanda, but it is defined in the Acharakanda. In treating of persons who are not eligible for marriage, Yájnavalkya says:

"He who has not deviated any way from the order of *Brahmachari* should marry a female who is beautiful (accomplished

* This disposes of the objection of 'Jurisprudence' that it is not true always that a cognate is a *Bhinna gotra sapinda,* and that as a descriptive term it is vague.

or graceful) who has not seen (or been enjoyed by or given to) another, who is pleasing, who is not a sapinda and who is younger to himself."

Then the Commentator explains who a *sapinda* is, and who is not. We here give a free translation of the same, (and a translation of the same is also found in I. L. R. 5 B., p. 110 at 119.)

"(He should marry a girl) who is not a *sapinda* or who is a *non-sapinda* (with himself). *Sapinda* is she who has the same (or one) body (in common with him). She who is not a *sapinda* is *asapinda*. Her (he should marry) *sapindaship*, therefore, exists through or by reason of connection of particles of one (or same body). For example, there exists *sapinda* relationship between the son and his father through connection with particles of the father's body, (*i.e.*, through connection of the son's body with particles of the father's body). In this manner, there exists *sapinda* relationship with his paternal grandfather and the rest through a connection with particles of their body through the medium of the father. Thus with the mother, by connection of particles of her (mother's) body. Likewise with the maternal grandfather and with the rest, through the mother. Likewise also with maternal aunts (mother's sisters) and uncles (mother's brothers) and the rest through connection with particles of the same (one) body, so with paternal uncles (father's brothers) and aunts (father's sisters) and the rest. Likewise, as between husband and wife by reason of generating one body (being generators of the same body). In this manner as between the wives of brothers (*sapindaship* exists) by reason of generating same body (by union) with persons who are begotten of one body. In this manner wherever the word '*sapinda*' occurs, it must be understood ('in all such places') (in the sense of) connection, either immediately or mediately, of particles of one body. Indeed, if it be said (that if this meaning be accepted), the rule "among *sapindas*, ten days' obitual impurity is ordained" will ordinarily apply even to the maternal grandfather and the rest (the answer is) this will be so if it were not for the special text "others should perform in the case of those who were given in marriage, (*i.e.*, married women, lit those who were given)" and other similar special texts. Therefore, wherever there is no special text the text "among *sapindas*, 'ten days" &c.," will throughout apply. And

certainly *sapinda* relationship should be described (as being the result of, or as being based upon) connection of particles of the same body. For, according to the Sruti "self was begotten of self," so also "after your son, be born of your son." Apastamba also says: "It can be clearly perceived that he himself is the person who is born differently." And so also the Garbha Upanishad says: "This body is made up of 6 layers—3 from the mother, and 3 from the father. From the father come bones, tendons (or muscles) and the marrow, and from the mother, skin, flesh and blood. Thus throughout by the ascertainment of connection of particles of one body (*sapindaship* is described). If, however, *sapindaship* (arises or exists) from connection arising from the presentation of funeral or exequial cakes; then *sapindaship* is not possible with the mother's family, (*i.e.*, relatives in the mother's line), and also with the brother's son and the rest. If a conventienal meaning is assigned to the word (sapinda) as a compound (lit by taking the collective signification) the Etymological meaning which is assigned in different places will have to be abandoned."

Then as to the limits of *sapindaship* and the computation of degrees, Yájnavalkya says:

Panchamát Saptamát Urdhvam mátrutah Pitrutah tathá.

"Beyond the 5th through the mother and beyond the 7th through the father (sapinda relationship ceases)." In commenting upon this text Vijnanesvara says: In the mother's family (or line) beyond the 5th and in the father's family (or line) beyond the 7th *sapinda* relationship ceases or returns (is to be understood). Therefore, this word '*sapinda*' although of general application by force of the particles of the body is bound or tied down to a particular matter as the words Nirmauthya Pankaja (lotus) and such like. In like manner the 6 persons or (ancestors) beginning from the father, the 6 persons or (descendants,) beginning from the son are *sapindas* and oneself is the 7th. When there is a division in the lines 7 is to be counted throughout in the above manner, commencing from the line diverging. So, the person who occupies the 5th place in calculation beginning with the mother, her father, grandfather, &c., is considered the 5th from the mother. So he who occupies the 7th place in calculation beginning with the father his father, &c., is considered the 7th from the father . . . . . .

What is said by Vasishta 'fifth from the mother and 7th from the father' and what is said by Paitinasi 'Beyond three removes from the mother and five removes from the father' must be intended to prohibit nearer degrees and not to recommend those degrees 'thus there is no conflict between the various smritis.'

As no other definition of *sapinda* is given (in the chapter on inheritance) it must be understood that it was used in the sense fixed to it by the author in the chapter on marriage. Again, it is not all persons who can be computed in this way are heritable *bandhus*. To be a heritable *bandhu*, the deceased and the claimant must be *sapindas* to each other. In other words, there must be mutuality of *sapindaship* in order that one may be a heritable *bandhu* to the deceased. This is, no doubt, not stated or recognized in the chapter on marriage. But as regards inheritance there is this qualification to what has been already considered in the chapter on marriage.

For in chapter II, section 3, verse 3, Mitakshara refers to and relies upon a text of Manu when discussing the rule of precedence among parents. The text of Manu is to be found in chapter IX, verse 187, and it runs thus:—

Anantarah sapindadyah tasya tasya dhanam bhavet.

The text itself is commented on by two of the leading commentators of the Mitakshara, *viz.*, Balam Bhatta and Visvesvara Bhatta. According to them the text means "The property of a near *sapinda* shall be that of a near *sapinda*." From this it follows that to give a heritable right there must be mutuality of sapindaship. (See Sarvadhikari, p. 569)

This principle has been recognized in the case of *Babu Lal* v. *Nanku Ram and another*, I.L.R., 22 C., 339. Their Lordships *Norris* and *Bannerjee*, J. J., observed "a *sapinda* of the propositus to be capable of inheriting must satisfy a further condition, *viz.*, that he must be so related to the propositus, that the propositus is also a *sapinda* of him, either directly or through the father or the mother. This mutuality of *sapindaship* between the propositus and his heritable *sapindas* is assumed as a necessary condition in the case of *Umaid Bahadur* v. *Udai Chand*, I. L. R., 6 C., 119, and the authority for this is to be found in the text of Manu (ch. IX, 187) cited in

the Mitakshara, chap: II, sec. 3, verse 3, as interpreted by Balam Bhatta and Visvesvara Bhatta, the two leading commentators on the Mitakshara. That text according to these commentators means 'the property of a near *sapinda* shall be that of near *sapinda*.' From this it is clear that a man in order to be a heritable sapinda of the *propositus* must be so related to him that they are sapindas of each other. (See also *Ramappa Naicken* v. *Sithammal*, I. L. R., 2, M. 187.)

We have thus deduced this rule that there must be mutual sapindaship to give *heredity*. To illustrate our meaning,—P is the propositus, A is his father, S denotes sons, D daughter

A S_1 S_2 I_3 D S_4

P

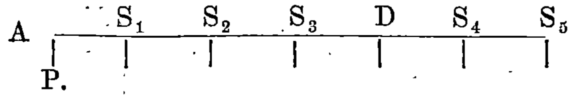
P is a sapinda of S_4; A is P's father, A is within 7 degrees of S_4, but S_4 is not the sapinda of P, as S_4 is not within 5 degrees A, as S_4 traces through a female. Here therefore there is no mutuality of *sapindaship*. If S_4 is heir of P, P must also be the heir of S_4. But this cannot be. Therefore we must reject S_4.

There is another rule which is deducible from the text of Mitakshara and which follows as an axiom from the definition of *sapinda* relationship. That is this. If a male or a female is not a *sapinda* of another, much less can the son of that male or female be the *sapinda* of that other, as his father or mother having no corporal particles (of the given person or of their common ancestor) in common with the given person can transmit none to his son. I shall illustrate this by the following example:—

F_5.
|
F_4.
|
F_3.
|
F_2.
|
M
|
F_1.
|
P.

Here F_5 cannot be the *sapinda* of P, though within 7 degrees from P (both tracing immediately through a male) as F_1 is not the

sapinda of F_6, being above 5 degrees from F_1 with whom he is related immediately through a female. If, therefore, the person's father is not a *sapinda* to another and has no heritable relationship, much less can that person be a *sapinda* to that other. One more example—



Here S_5 is within 7 degrees from A, and A is also within 7 degrees (both tracing through a male). But S_4 is not a *sapinda* of A as he is beyond 5 degrees from A (S_4 tracing through a female). If S_4 has no common corporal particles of the ancestor transmitted to him through his mother, how can he transmit any to S_5? Therefore S_5 and A, though within 7 degrees of each other, and though each of them trace through a male, yet as his father was not a *sapinda* of A and had no common corporal particles with him, could not be his (A's) *sapinda*.

The principle above enunciated is clearly embodied in the following passages of the Mitakshara:—

"*Sapinda* relationship arises between two people through their being connected by particles of one body. Thus the son stands in *sapinda* relationship to his father, because of *the particles of his father's body having entered* (*his*). In like (manner stands the grandson in *sapinda* relationship to his paternal grandfather, and the rest because *through his father* particles of his grandfather's body have entered into (his own) . . . Likewise the grandson stands in *sapinda* relationship to his maternal grandfather, and the rest *through his mother*."

Of course there are cases where though A is not a *sapinda* of B, yet A's son is *sapinda* of B. This will arise only in this way. A may not be a *sapinda* to his wife's relations, say, to his father-in-law (where A marries from an utterly strange family). But A's son through his mother (A's wife) is a *sapinda* of A's father-in-law. This is obvious. The husband as such is not the *sapinda* of his wife's relations, but his issue will be through their mother. But if the mother has no *sapinda* relationship, the son cannot also have any.

There is yet another rule deducible from the authorities. It is this. Yájnavalkya says that you are to count 7 degrees through the father and 5 through the mother. But if you want to see the limit of the *sapinda* relationship among your descendants, what is the rule? Of course the Mitakshara says that the six persons, beginning with your son, would also be *sapindas*. But with regard to your descendants tracing through your daughter, what is the rule? On the analogy of 5 degrees through your mother in the case of your descendants also, you have to trace 5 degrees through your daughter. If in the maternal grandfather's line *sapinda* relationship ceases all beyond the fifth; counting from you in the daughter's line also, you have to count only 5 degrees from you. In the daughter's case the particles of blood are just as much corrupted as in the mother by the fact of a female intervening. Therefore S_3 is the limit of sapinda relationship in the daughter's line.

P.
|
D.
|
S_1
|
S_2
|
S_3

No doubt the Mitakshara in explaining 'through the mother,' &c., regards it quite generally, but upon a strict interpretation of the text the above result will follow and is more in accordance with principle and analogy. The commentators in their fear of the prohibited degree, take 7 degrees throughout for marriage in the father's line (or one's own line).

It will be seen later on that our tables are filled up without any particular reference to the working out of these definitions of *sapindaship*. This is owing to the explanations we have given about the different classes of *bandhus* and the way in which the Mitakshara divides the *bandhus*. For the Mitakshara divides *one's bandhus* into three classes and makes them his heirs. We have only learnt who the *bandhus* generally are. We have yet to see who one's heritable bandhus are as comprised in the three classes mentioned by the Mitakshara. It will be seen that if we apply the definition, he correctness of our tables will be manifest.

We, therefore, know that the *bandhus* are to be found among the persons who are within the fifth from the mother and the seventh from the father, calculated from the deceased where the relationship is lineal; with regard to collaterals, the calculation is, as already stated, different.

If they are not within those limits, we may confidently assert that they are not *bandhus*.

P. R. GANAPATI AIYAR.

TRANSLATED FROM THE VIVADARATNAKARA.

On Sureties.

On this subject, Katyayana says: "A master, an enemy, an agent of the master likewise, a person in duress, a man sentenced, a person in doubt, a parcener, a friend, disciples, an official under the king, persons who have entered the sanyasin's order, a person who is unable to pay the creditor and a fine equal in amount to the king and an unknown person; these are not worthy to be sureties for (the accomplishment of) an act."(1) Here "master" means 'one above the reach of law.' "A person in doubt" refers to one who is on the point of death. Some take it to mean 'a person who has been punished for committing an offence. *Rikthi*] one who has wealth in common with the creditor or the debtor. *Antevásina*] disciples. The author of the Mitakshara, however, reads '*atyantavásinah*' and explains it 'perpetual students.' "Who is unable to pay" is understood before "a fine equal in amount to the king." This has reference to a person on whom punishment is inflicted by the king, in case he had not given. It should also be understood that he, after whose death there is no hope of recovering the money, should not be admitted as a surety.

Yájnavalkya says: "It is ordained that among brothers, husband and wife, and father and son, standing surety, money-lending and giving evidence are not allowed before partition."(2) The meaning is that before partition, standing surety, the transactions of creditor and debtor and giving evidence are not proper between brothers, husband and wife and father and son.

(1) I. Cole. Dig., 155, CXXXIX. (2) Yájnavalkya, II, 52.

On this same subject, Narada says: "Separated, not unseparated, brothers may mutually give evidence, stand surety, give and receive."(1) The meaning is that (unseparated brothers) should not stand surety, etc.

Brihaspati says: "Four kinds of surety have been laid down by sages in the Code of Law: for production, for vouching for one's trustworthiness, for payment and for delivering the loan (to the creditor). The first says: 'I shall produce him'; another says: 'He is a virtuous man'; another says: 'I will pay this'; the fourth says: 'I will deliver the money.' In default, the first two should be made to pay the amount due at the time; and the last two, and in their default their sons (should be made to pay) in case of the debtors breaking their engagements."(2)

"For delivering the loan"] for delivering the sum to the creditor. The first two, if the one fail to produce and if the other fail to prove the trustworthiness should be made to pay the amount due at that time. The last two should be made to pay if the debtor fails to give in the one case, and fails to deliver the property in the other. In default of the sureties for payment and for delivering, their sons should be made to pay.

Yájnavalkya: "Where the surety for producing or for trustworthiness dies, his sons shall not pay the debt; but those who stood surety for payment should pay."(3) The meaning is 'the sons of the surety for payment, etc., (shall pay).'

Katyayana: "A surety for payment, production, confidence (*i.e.*, trustworthiness), for dispute, and for oaths, should be made to pay what was due, in case the debtor fails to keep his promise."(4). The meaning is that a surety for payment, for producing the debtor, for proving the trustworthiness, for dispute with the creditor and for taking oaths should, if he fails in that, be made to pay the amount due to the creditor.

Narada: 'Three sorts of sureties are declared by the wise for three purposes, *viz.*, for production, for payment and for honesty. If the debtors do not pay, or if honesty be disproved, the surety (for payment or for honesty) must pay that debt; and likewise, (the

(1) Narada, XIII, 39.
(2) Brihaspati XI, 39—42.
(3) Yàjnavalkya, II, 54.
(4) I. Cole. Dig., 168, CXLV.

surety for producing, if he does not produce."(1) The meaning is that, if the debtors fail to discharge the debts, the surety for payment should pay it; the surety for honesty if honesty be disproved, and the surety for production if he fails to produce shall pay the debt. This text, though not quoted by Lakshmidhara and others, is here quoted, because it is found cited in Halayudha's compilation.

Katyayana: "If the surety for production does not produce at the stipulated time and place, he shall, if he was not prevented from doing so by any act of the king or god, pay what he has promised. If the surety does not produce the person when the stipulated time had arrived, he shall be made to pay the agreed sum; this rule applies even where he is dead."(2) The meaning is this: If the surety for production fails to produce (the debtor) at the time when and the place where he had agreed to produce him, he should pay to the creditor the sum due according to the document, provided he did so through any other cause than any obstacle of the king or god. Even in case of any obstacle caused by the king or god, he should pay the sum if he fails to produce after the removal of the obstacle. Even if the debtor be dead, the surety for production should pay the money.

Accordingly: "If the surety fails, in however small a degree in the matter of time and place appointed for the ceremony, he shall be compelled to pay that sum as if proved; this rule applies where the debt had been proved."(3) *Kriyākāre*] fixed for ordeal or ceremony. If the surety for taking oaths transgresses these in even so small a degree, then the ordeal should not be performed. The surety shall be made to pay the sum, as the sum becomes proved to be payable by the surety. The meaning is that the same rule or mode should be known to apply where the debt had been proved.

Accordingly: "From a malicious person, who may be disposed by ill-will to seek the protection of another, to do what may be unpleasant to him, to associate himself with wicked men, let a surety (for honesty) be received, for fear lest he break his promise. If the conduct (of the debtor) be questioned, the surety shall be made to pay."(4) [Protection of another] protection of an enemy.

(1) Narada, I 118 and 119.
(2) I. Cole. Dig., 170, CXLVI.
(3) I. Cole. Dig., 173, CL.
(4) *Ibid*, 171, CXLIX.

Abhavyam) unpleasant. [Association with wicked men] with thieves, etc. That malicious person who is capable of doing all these. The meaning of the former portion is that for fear (that he may break his word) let a surety be taken for confidence. The meaning of the latter portion is that where the good behaviour of the debtor becomes doubtful, then also should a surety be taken. Indeed, it means that, wherever there is any doubt, the king should cause a surety for confidence to be given.

Manu: "If the surety for payment dies, let his heirs be made to pay."(1) "The surety for payment" means "the surety who says 'I will give.'" In his default, his heirs, *i.e.*, sons, shall be made to pay, according to the text "in their absence, their sons."

Katyayana: "Where one becomes a surety for appearance having obtained a hypothecation from the debtor, the son of such surety shall be compelled by the creditor to pay the debt."(2) The meaning is that where one becomes a surety for appearance having obtained a hypothecation from him, his son should, if he is dead, be made to pay the debt to the creditor.

Manu: "When the surety for other purposes than for payment dies, his affairs being known, how is the creditor, if he is so disposed, to realise the debt? If the surety had been given sufficient money by the debtor, the son of the surety who so received the money shall pay the debt out of his own property; this is a fixed law."(3) *Adátari*] sureties other than the surety for payment. His affairs being known] the circumstances of his having received a pledge. How then if such surety die, can the creditor entertain a wish afterwards to realise it? This is the question; and the answer is stated by 'He who has been given money, etc.' *Niradishtam*) paid by the debtor to the surety. The meaning is that if he dies possessed of sufficient wealth, the son of the surety who had so received the money shall pay the debt out of his own wealth. The term 'paid money by the debtor' used of the son is illustrative. In the compilation of Halayudha (the author) after explaining the term 'whose affairs have been known' by 'the circumstance of whose becoming a surety without having taken a pledge is known' and states that the first verse is intended to bear a negative answer, *viz.*, that such surety (*i.e.*, one who had not taken a

(1) Manu, VIII, 160.
(2) I. Cole. Dig., 174, CLIII.
(3) Manu, VIII, 161.

pledge) being dead, the creditor can by no means receive the debt, in answer to the question "how can the creditor recover the debt?" In effect there is no difference.

Vyasa: "The grandson shall pay the debt of his paternal grandsire; the son only shall pay the debt contracted by the father for becoming a surety; (both of these shall pay) without interest; their sons shall not be compelled to pay; this is settled."(1) *Samam*] without interest. All the debts of the paternal grandfather shall be paid by the grandson without interest; the debt contracted by the father for becoming a surety should be paid by the son without interest. The meaning is that their sons, *i.e.*, the great-grandson and grandson need not pay.

Katyayana: "Debts incurred (by the paternal grandfather) for becoming surety, should never be paid by the grandsons; all (such) debt incurred by the father should be paid by the sons without interest."(2) The meaning is that debt incurred by the father on account of becoming surety should be paid by the son without interest, and never by the grandson.

Yájnavalkya: "If the sureties are many in number, they shall pay the debt according to their shares; but if they are bound severally, the payment must be made by any one of them, as the creditor pleases."(3) When one surety is like another, *i.e.*, independent in respect of his affairs, every one of the sureties shall be made to pay the whole debt to the creditor.

Brihaspati: "The creditor should allow time for the surety to search for (the debtor) who is missing; a fortnight, a month or a month and a half, according to (the distance, etc., of) the place (where the debtor is supposed to be hiding himself); the sureties should not be excessively harassed; they should be made to pay the debt gradually; in (the debtor's) presence, they should not be harassed; this is the law regarding sureties."(4) Who is missing] the debtor who had fled away. The meaning is that 'in his presence,' *i.e.*, if the debtor is near at hand or willing to discharge the debt, the surety for production or for payment of the debt should not be troubled.

(1) I. Cole. Dig., 178, CLVII. (2) I. Cole. Dig., 178, CLVIII.
(3) Yájnavalkya, II, 55. (4) Brihaspati, XI, 42 and 43.

Accordingly, "If a surety, when harassed, pay the debt for which he stood surety, he shall get twice that amount (from the debtor) after a month and a half."(1) 'Surety' who has been made a surety.

Vishnu and Narada: "What sum of money the surety pays when being hard pressed by the creditor, the debtor shall pay the surety twice the amount."[2]

Yajnavalkya: "Whatever money the surety is made to pay to the creditors publicly, twice that amount should be given by the debtors (to the surety)."[3].

Katyayana: "That surety, who when being pressed (by the creditor) according to law, pays a certain sum of money shall get back that amount, after proving it by witnesses."[4] By saying "what was paid by the surety, let him take," the paying of it without interest is to be understood. This too shall apply only (when it is paid) before a month and a half. The payment of double the sum ordained by Yajnavalkya and others if it be made after the expiration of a month and a half is not inconsistent. But Grihesvara Misra quotes this text in support of the statement that the surety is entitled to recover from the debtor what the former has paid to the creditor to conciliate him. But this payment of money by the surety in order to be recoverable from the debtor must have been made by him after information given and on the advice of a middleman.

Accordingly, Brihaspati says: "If ignorant persons from their good nature pay debts unasked, how could they obtain the money so given from others."(5) Unasked by a middleman.

Here ends the Chapter of the Vivadaratnakara on Sureties.

S. SITARAMA SASTRI.

THE NEW RULES FOR THE MADRAS COURT OF SMALL CAUSES FRAMED BY THE HIGH COURT UNDER ACT I OF 1895.

The Act No. I of 1895, which empowered the High Court to frame rules for the regulation of the procedure and practice in the Presidency

(1) *Ibid* XI, 44.
(2) Not found.
(3) Yajnavalkya, II, 56.
(4) I. Cole. Dig. 181, CLXIV.
(5) Not found.

Court of Small Causes, received the assent of the Governor-General so long ago as the 4th January 1895, and, though there has thus been a delay of nearly three years and a half on the part of the High Court in exercising that power, the new rules bear evident marks of haste and want of care and seem to have been issued without due consultation with those whose special knowledge of the practice and working of this Court would have enabled them to make useful suggestions in their framing. At the same time, it must be observed, they contain some changes and new provisions which are of a beneficent character and admirably suited to the Court in question. The form in which the rules have been issued is very inconvenient. To have merely noted the numbers of the chapters or sections of the Civil Procedure Code applicable, except where alterations have been made, or new matter has been added, would have been less cumbersome and made the task lighter for the practitioner, as well as the Judge, who have to apply these rules. Some of the definitions in Rule 1 seem to have been transcribed from the Civil Procedure Code without any consideration whether they are of any use for the purpose in hand. For instance, the definition of a Court subordinate to the High Court and the District Court and the elaborate definition of an order having the force of a decree possess merely an academical interest so far as these rules are concerned. In many places, in transcribing from the Code of Civil Procedure, even the necessary verbal alterations have not been made. A Subordinate Court, for instance, is defined "for the purposes of *this Code.*" Another amusing instance is the definition of Government in any part of British India in which the Civil Procedure Code operates, without stating what it means under these rules. Other instances of such careless transcription abound throughout the rules, but we shall content ourselves with pointing out only a few. (*Vide* Rules 21, 296, 391 and 399.) Again, Rule 298 provides how the plaint of a corporation or company may be subscribed and *verified,* although under Rule 34 and the other rules no plaint is required to be verified. Again, Rule 396 states that the provisions thereinbefore contained as to the stating of a case by a Judge shall be applicable to the stating of a case by the Registrar, whereas there are no provisions in the rules relating to the stating of a case by a Judge, S. 617 of the Civil Procedure Code not being reproduced here. The insertion of the usual provision that any appointments, etc., made under any old law shall be deemed to have been made under the corresponding provisions of these rules would have been very useful. For example, the Head Clerk of the Court was empowered under S. 197, Civil Procedure Code, to swear affidavits. That section being now superseded, it is now held that the Head Clerk

has no such power, notwithstanding the reproduction of that section in Rule 138, with the result that parties have to go to the Registrar to swear affidavits—a proceeding which entails much delay and inconvenience. Rule 5 begins: "No Court shall try, etc.," while Rule 6 says: "No foreign judgment shall operate as a bar to a suit *in British India*," while admittedly these rules do not and cannot bind Courts other than that for which they are made. The definition of recognized agents in S. 37 of the Civil Procedure Code, with the exception of cl. (*b*), though applicable to the Small Cause Court under the second schedule to Act XV of 1882, was, by a subsequent notification of the Court with the sanction of the Local Government, declared not to be so applicable. Rule 20 makes that definition again applicable with two important variations. Not only persons resident outside the jurisdiction, but also persons residing within the jurisdiction, may appoint such agents, although the marginal note retains the words "out of jurisdiction," evidently taken from the Civil Procedure Code without the necessary alteration, as the words of the rule itself must be held to override the marginal note. Such agents, again, may be appointed not only by general but also by special powers-of-attorney. Rule 33 reproduces the provisions of the Code as to the contents of a plaint. These provisions, though originally applicable to the Court under the second schedule to Act XV of 1882, were found unsuitable in practice and abrogated by a notification under S. 23 of that Act. We think it would be quite sufficient if the plaint stated merely, as hitherto, the parties, the cause of action, and when and where it arose. By Rule 34, it is only when the plaintiff is, owing to absence, or other sufficient cause, unable to sign the plaint, that it may be signed by any person duly authorized by him in this behalf. Such authorization should be in writing and presented with the plaint. No verification is necessary, not even in the case of plaints under Ch. XXXVI of these rules (Ch. XXXIX of the Civil Procedure Code) which had to be verified under the old rules. Rule 104 requires the defendant, if he contests the plaintiff's claim, to state his plea or pleas at the first hearing, and by Rule 109, in such a case, the Court may, if it thinks fit, frame issues and adjourn the case for final hearing. It is to be hoped that this latter provision will henceforth be largely and judiciously availed of, as it is a great hardship to the plaintiff to require him to disprove a case which he knows nothing about, and in many cases contested suits, though adjourned to be taken up later on in the course of the day of first hearing, are not, nor can be, as a matter of fact, taken up on that day. In the rules relating to the examination of witnesses, it might usefully have been provided that judges may take such notes of the evidence of witnesses as they think fit, so as to make such notes admissible in evidenc

in subsequent proceedings for giving false evidence etc., without the necessity of calling the judges themselves as witnesses. It is to be hoped that the High Court will soon exercise its power under cl. (c) of Rule 137 of appointing one or more persons in the Small Cause Court to swear affidavits. We note in the rules the absence of all provision for the transmission of decrees and the execution of transmitted decrees. S. 31 of Act XV of 1882 provides, no doubt, for the transmission of decrees of the Small Cause Court to other Courts and their execution by them, and S. 223 of the Civil Procedure Code provides in certain cases for the transmission to the Presidency Small Cause Court of decrees of other Courts, and S. 225 for the execution of decrees so transmitted. [See also S. 8, Civil Procedure Code]. We take it that the applicability of these and similar sections is not affected by the rules, although they are issued in "supersession of the law and rules now in force with respect to the procedure or practice of the Small Cause Court." * Similarly S. 648 of the Civil Procedure Code provides for the execution by the Small Cause Court of interlocutory orders of arrest and attachment passed by other Courts. But we fail to see why Ss. 229, 229-A and 229-B of the Civil Procedure Code, which were formerly applicable to the Small Cause Court under the second schedule to Act XV of 1882, have not been reproduced The time beyond which it is necessary to take out notice of execution of decree is extended from one to two years. Warrants are to be made returnable within two months. These are very useful changes, and another important and beneficent provision is made in Rule 190, whereby a garnishee can, in execution proceedings, be required to show cause why he should not pay the debt, etc., into Court; and if he shews no such cause, execution may be ordered to issue against him, and if he seeks to show such cause, the claim may be tried as a regular suit. The only part of this provision, of which we do not approve, is that which gives the Court power to assume at its discretion jurisdiction over claims which it could not adjudicate upon in regular suits. An attachment of movable property by seizure shall not, under Rule 208, remain in force for more than three months; after which time it

* We arrive at this conclusion for the following among other reasons. When an Act makes certain provisions and gives power to another body to make rules, such rules should, unless the contrary is clearly denoted, be made subject to those provisions. If the Legislature had intended that the rules should supersede these sections, it would have repealed them. as it has repealed Ss. 9 and 23 of Act XV of 1882. Again, it is doubtful if S. 223 and the similar sections of the Civil Procedure Code can be said to provide for the practice or procedure in the Small Cause Court within the meaning of Act I of 1895 and the rules: they rather provide for the carrying out of decrees and orders of other Courts through the instrumentality of that Court.

shall be returned to the judgment-debtor on his application. Failing such application within three months, it may be sold and the proceeds retained in deposit, for whom it does not appear. We fail to see why the limit of twelve years for the execution of a decree for money prescribed by S. 230 of the Civil Procedure Code and the power to issue a temporary injunction are not extended to the Small Cause Court, although they are extended to Provincial Small Cause Courts. S. 617 of the Civil Procedure Code which gave power to the Court to make a reference to the High Court at discretion and which was applicable under the second schedule to Act XV of 1882 is not reproduced in these rules. Nor is the provision for the exemption from arrest under civil process of judges, pleaders, parties and witnesses, while going to and returning from Court. Whether these omissions have been made intentionally, and if so, for what reason, we cannot understand.

Besides these, we note a very grave omission—the absence of all rules relating to new trials and the constitution of benches of two or more judges to hear the same. The previous rules on the subject are, we apprehend, abrogated, as the new rules are issued in "supersession of the law and rules now in force with respect to practice or procedure" in that Court. S. 9 of Act XV of 1882, as amended by Act I of 1895, expressly declares that rules made under that section may provide for the exercise by one or more of the Judges of any powers conferred on the Court by that or any other enactment. It may be doubted, under these circumstances, whether two or more judges can validly sit for any purpose, and whether applications for new trials would not lie on grounds other than that of error in law.

We also note another defect for which not the rules but the Legislature itself is responsible, *viz.*, the repeal of the second schedule to Act XV of 1882, which declared what sections of the Civil Procedure Code were applicable to the Small Cause Court and the bestowal of power on the High Court to make rules for 'the practice and procedure' merely in that Court. The effect of this is to place the Small Cause Court in an anomalous position. The Civil Procedure Code treats of many mutual relations of the Courts to one another; but, as the Small Cause Court is not within the pale of that Code, and as the rules made by the High Court can bind only the Small Cause Court, such mutual relations cannot be provided for. To make our meaning clear by examples. Rule 399 empowers the Small Cause Court to send its interlocutory orders of attachment and arrest to other Courts for execution, But no power is, or can be, conferred by the rules on those Courts to execute such orders, similar to the power given in S. 648, Civil Procedure Code. Similarly

with respect to the execution by other Courts of commissions issued to them by the Small Cause Court, notwithstanding that Rule 268 in this case provides that the Court receiving the commission shall examine the witness pursuant thereto. Again, it may be doubted whether the High Court has any power of revision under S. 622 of the Civil Procedure Code over the Small Cause Court, as that section has by the repeal of the second schedule to Act XV of 1882, ceased to be applicable to that Court.

X. Y. Z.

NOTES OF INDIAN CASES.

Marudamuthu Nadan *v.* **Srinivasa Pillai,** I. L. R., 21 M., 128. The decision of the Full Bench in this case, would, it appears to us, be accepted as sound law throughout India, although some decisions could be quoted in Bengal to the contrary. If acceleration of the reversioner's estate is the result of the surrender of the widow's interest, it can only happen on the footing of the widow-stepping out leaving the inheritance to take its course. A surrender of each item of property would only amount to a surrender of life-interest, the reversionary interest being ascertainable upon her death. It is only the surrender of the whole estate that can have the effect of a natural or civil death. It would be absurd to suppose as many civil deaths as there are surrenders of property by her.

Pichuvayyan *v.* **Vilakkudiyan Asari,** I. L. R., 21 M., 134. The learned Judges observe that a mortgagee of service inam land, inalienable under Regulation VI of 1831 can sue for it only in the Revenue Courts. Supposing a person was in adverse possession of such land against the office-holder, it would seem to us, he would be entitled to retain possession after the lapse of the statutory period. He would not have to sue for it in the Revenue Courts after his title has become complete. S. 3 of the Regulation appears to us to refer to claims to the land based upon the right to the office. There would, therefore, be no reason why a person claiming a mortgage right by adverse possession should not establish it in the Regular Courts.

Viru Mamma *v.* **Krishnan,** I. L. R., 21 M., 141. Madras Act I of 1887 (Malabar Tenants' Improvements Act) has given rise to much difficulty of interpretation; and several judges have confessed themselves unable to understand the Act. The Act was intended as a remedial measure and compensation for improvements in all cases coming after the Act was intended to be granted according to its provisions. The

language of S. 7 as pointed out by the learned Judges does not deal with contracts entered into prior to the Act as regards improvements effected before the Act. It would also appear to us that even after the Act has come into force where agreements are entered into as to the value of improvements effected prior to the agreement, they cannot be overridden by the provisions of the Act. We are, aware, that this view of ours is in conflict with the opinion of *Subrahmania Aiyar* and *Davies*, J. J., in *Eressa Menon* v. *Shamu Patter*, I. L. R., 21 M., 138. But we think sufficient attention was not given to the language of the section.

Rego *v.* **Abu Beari,** I. L. R., 21 M., 151. We think there is something wrong in the report of this case. The reporter's statement of the facts seems to be erroneous. Upon his statement of the facts we do not see how any question as regards the application of Art. 134 arises. He says, that a person mortgages property and afterwards sells it to the mortgagee. The plaintiff who is the subsequent vendee from the mortgagor sues to redeem. It may be that the plaintiff's sale was bad if the sale to the mortgagee was good. But we cannot see how any question of limitation arises.

Ittappan *v.* **Manavikrama,** I. L. R., 21 M., 153. The case raises very interesting questions and was argued most elaborately before two of the ablest Judges of the Madras High Court. But it must be confessed that the judgment is somewhat disappointing. One question was, as to the application of S. 43, C. P. C. Two persons are tenants in common of numerous items of properties. One of them sues the other for partition of one or two items and obtains a decree. He now sues for the partition of the whole of the remaining items. The defendant pleads the bar of S. 43. It is agreed that if the cause of action in the subsequent suit were different, S. 43 would be no bar. *Shephard*, J., argues :—, suppose the previous suit had been dismissed on the ground that partition of all the items should have been asked for; would not a subsequent suit for partition of the whole be maintainable ? and therefore, he asks, why should it make any difference that the prior suit was decreed. But we think there is a difference. Where the former suit is dismissed upon the preliminary ground that a suit for partition of the whole should have been brought, it is a refusal by the Court to adjudicate upon the cause of the action and such refusal cannot debar the plaintiff from making the whole claim upon his cause of action in a subsequent suit. That is not a separate action for partition of each item of property. But where the prior suit is decreed, it is an adjudication upon the cause of action and a subsequent suit would fall within the scope of S. 43. *Subrahmania Aiyar*, J., argues that because the plaintiff in the former

suit alleged a right to have a partition of one item only and in the subsequent suit alleges a cause of action for the partition of all the items they are distinct causes of action. But the question whether the causes of action are one and the same does not depend upon how the plaintiff chooses to describe the cause of action in the first suit, but what is in substance the real cause of action. The reasoning of the learned Judges does not, therefore, commend itself to us. But it is possible to support the conclusion arrived at by a different course of reasoning. The right to partition is an incident of tenancy in common. There is no breach or violation on the part of the defendant required to give the plaintiff a right to sue. As the right to divide accrues every moment the tenancy continues, there seems to be a fresh cause of action upon the basis of the continuing tenancy after the termination of the first suit. If we are right in this view, the conclusion would be unexceptionable.

As regards the other question of limitation also the judgments do not appear to us to be altogether satisfactory

Seshadri Aiyanar v. Nataraja Aiyar, I. L. R., 21 M., 179. This decision is only a further illustration of the hopeless state to which matters have drifted under Act XX of 1863. An important question is raised as to the powers of the committee over the trustees subject to them under the Act. It is said they have power to dismiss for good cause; the question is raised have they the power to suspend the trustee pending enquiry into charges against them? This power is denied by *Shephard*, J., and apparently also by the *Chief Justice*, while *Davies*, J., strenuously affirms it. Suspension, of course, is not different from dismissal, and if a good cause were necessary to justify the one, it would seem to be necessary to justify the other.

That the committee should possess large disciplinary powers as claimed by *Davies*, J., for their suspension pending enquiry would be reasonable. It is impossible to express any opinion upon questions of this description where the Act throws no light. It is highly regrettable that the Legislature should sullenly decline to further any measure of legislation which will set matters right. This is only one of the numerous instances in which the Act has practically become unworkable.

Ramasamayyan v. Veeraswami Ayyar, I. L. R., 21 M. 222 Here again the reporter has failed to catch the point in the decision. Under a query, he notes whether *Bhawani Prasad* v. *Kallu* I. L. R., 17 A., 537 lays down the right rule with reference to S. 85 of the Transfer of Property Act. We understand, however, *Shephard*, J., to disapprove of it, and *Davies*, J., to say that he cannot say he disagrees with it.

The question, however, does not appear to us to involve any difficulty and the dissenting judgment of *Banerji*, J., in *Bhawani Prasad* v. *Kallu*, I. L. R., 17 A., 537, appears to us to put the matter right. The point is where a decree is obtained upon a mortgage against a Hindu father and property sold, whether the sons who were not made parties to the mortgage suit can contend that the sale did not affect their interest. The authority of the decisions of the Privy Council is clear that the sale passes the son's interest also. But has S. 85 made any difference? We think not. *Turner*, C. J., thought so in the case in *Ponnappa Pillai* v. *Pappuvayyangar*, I. L. R., 9 M., 343. That section would justify the dismissal of the suit if the sons were not made parties. But if a decree has been passed, S. 85 cannot affect the validity of the sale held in pursuance of it any more than a sale held in pursuance of a money-decree. Unless the decree was itself a nullity against the father also, which is absurd, the consequence of the sale is to pass the son's property also.

Sanjivi *v.* Jalajakshi, I. L. R., 21 M., 229. We are glad to note the decision of *Subrahmania Aiyar* and *Benson*, J. J., in this case. Judicial opinion has been rather slowly drifting towards the conclusion arrived at in this case and the Judges have at last pronounced that the adoption of a dancing girl which every body in this country knows to be for the purpose of prostitution is invalid. It is absurd to talk of the adoption of a girl by a woman and more so of the plurality of such adoptions. At one time the moral sense of the community was said to be in consonance with the recognition of such adoptions, but at last the right standard of morality was found in the penal law. Testamentary power is large now-a-days and even a dancing girl has not got to resort to the device of trading in prostitution to enable her to pass her property to whomsoever she likes.

SUMMARY OF RECENT CASES.

Rango Balaji *v.* Mudiyeppa bin Mallappa.

*Evidence—Presumption as to death of person not heard of for seven years—Presumption as to date of death of person not heard of for seven years—Onus of proof—*Res judicata*—Plaintiff recovering under deed of gift though issue of adoption decided against him, such issue not* res judicata *—Adoption, validity of, depending upon fact of natural son being alive or dead at date of it—Deed of gift or will conferring estate an account of filling certain character, not necessary for such party to prove affirmatively that he fills it, in order to recover estate—Indian Evidence Act, I of 1872, Sections* 107 *and* 108.

Where a suit is based on a title by adoption as well as under a deed, and is decided in favour of the plaintiff on the strength of the deed, the

issue as to adoption being found against him, the decision on the issue does not render the question of the adoption *res judicata* in a subsequent suit as regards other property, between the plaintiff and the representatives of the defendant in the former suit.

A person not having been heard of for seven years, though under Sections 107 and 108 of the Evidence Act, the presumption is that he is dead, there is no presumption as to when he died or that he lived for seven years. If it is necessary to establish the exact date of his death, he, upon whom the *onus* of establishing that date is cast, must establish it or otherwise he must fail. The plaintiff seeking to recover property on the ground of his adoption, the validity of which depend on the fact as to whether his adoptive father's natural son who was missing before the adoption, was alive or dead at the date of it, must prove affirmatively that the natural son was dead at the date of his adoption. If the plaintiff cannot prove that the adoption was valid and the defendant cannot prove that it was invalid, no presumption can be raised for or against the adoption. The question would be one of *onus* of proof.

Where a deed of gift or will confers an estate upon a named person because he fills, or by reason of his filling, a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character, the *onus* of proving that he does not fill the character which is the reason of the gift lies upon those who dispute his claim :—*Printed Judgment of the B. H. C. for 1898.*

Solicitor's lien—Third parties—Administration suit—Lien acquired before action.

In re **Hawkes, Ackerman** *v.* **Lockhart** [1898, II, Ch., 1, C. A.]

In this case the question, what is the extent of a solicitor's lien on the records of his client in his possession and how and against whom such lien can be exercised, was very elaborately argued before the Court of Appeal. The Judges composing the Bench that heard the appeal have also given very elaborate judgments, fully dealing with the subject. G, a testator, had during his life-time employed one Cridland as his solicitor, and in the course of such employment Cridland came into possession of certain documents belonging to G. At the date of G's death a considerable sum was due to Cridland for costs and money lent. Subsequently, the executors of G employed Cridland to take out administration, and the usual administration judgment was pronounced. But, as the action was not prosecuted with due diligence, the Court handed over the administration to one Pearce, a creditor, the estate being insolvent. The exe-

cutors, however, remained parties on the record and Cridland continued to act as before. In the course of the administration, Pearce wanted to enforce an outstanding mortgage security forming part of the estate and wanted Cridland to produce the necessary documents so as to enable him to prepare a case for counsel. Cridland refused to produce them claiming his usual lien. The Court of Appeal held confirming the decision, of *Kekewich*, J., that, notwithstanding his lien, Cridland was bound to produce the document in question and that he can be compelled to do so summarily by an ordinary summons.

A solicitor's lien is simply a right to retain his client's documents as against the client and persons representing him. As between the solicitor and third parties the solicitor has no greater right to refuse production of documents on which he has a lien than his client would have if he had the documents in his own possession. If the client is bound to produce them for the benefit of a third party, so also must the solicitor, and it is immaterial that the lien had been acquired before the action of the third party was commenced.

Internatonal law—Matrimonial domicile—Domicile at the time of death.

In re **De Nicols, De Nicols** *v.* **Curlier** [1898, II, Ch., 61 C. A.]

A testator and his wife, both French, were married in France. They entered into no express contract on their marriage with respect to their property, present or future. Subsequently, they went to England taking with them a small fortune and there they became permanently domiciled. The husband amassed a large fortune in England and died there in 1897. leaving a will by which he gave a life-estate to his wife in all his property and the remainder to his daughter and her children. On the death of the husband, the wife took out an originating summons to ascertain her rights and interests in the property of the testator. *Kekewich*, J., held that the change of domicile did not alter the legal position of the parties and that her rights were governed by the French Law, the law applicable to the matrimonial domicile. On appeal, however, the Court of Appeal reversed his decision and held following [*Lashley* v. *Hog*, 1804, 4. Pat, 581, House of Lords] that on a change of domicile the rights of husband and wife as to unsettled moveable property also changed, and that as at the time of the husband's death the parties were domiciled in England their rights were governed by the English Law, and that, consequently, the husband's personal estate was effectually disposed of by his will.

House of Lords' Decision—Res judicata.

The London Street Tramways Co., Ld. *v.* The London County Council [1898, A. C., 375].

Under the Tramways' Act of 1870, the London County Council purchased from the Street Tramways Co., Ld., certain portions of their Tramways. The Company claimed to be paid, for their tramway undertaking, its value as a going and profit earning concern and tendered before the referee of the Board, evidence showing that at the time of the notice to sell, there were existing profits of the Company. The referee, however, rejected the evidence and held that the Act did not allow him to adopt a method of valuation based upon profits. The Company then applied to the Queen's Bench Division to set aside the award; but the application was referred, and this decision was confirmed by the Court of Appeal. The Company then brought the present appeal before the House.

There were previous decisions of the House upon the same point in this appeal, and the question arose as to the power of the House to re-consider its own decisions and if it thought them wrong to overrule or depart from them in subsequent cases.

The Lord Chancellor in delivering the judgment said, that "the decision once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was *res integra* and could be re-argued and that so the House be asked to re-consider its own decision." An erroneous decision of the House, can therefore be set right only by an Act of Parliament.

We have carefully gone through the arguments of the Counsel and the judgment of the House, but we find no valid reason whatever stated for the enunciation of this anomalous proposition. The only reason given is "*stare decisis*," *i.e.*, that the House has on a number of occasions acted upon this rule of Law. But with profound respect to the learned Lords, we humbly submit that the doctrine of "*stare decisis*" has been unduly extended. The application of that doctrine ought to be limited to those decisions alone which declare laws directly defining the rights and liabilities of subjects. It ought not to be extended to decisions which define the declaratory power of the Court itself, *i.e.*, its own jurisdiction. In the course of the argument the learned Counsel for the respondents suggested a case where this rule may lead to a glaringly absurd result *e.g.*, where the House omitted to notice an Act of Parliament. The Lord Chancellor gets over this by saying that the finding out of the existence of an Act of Parliament is a question of fact

and not of law and therefore, can be re-argued. We humbly submit that the answer given is not satisfactory. In enunciating a rule of law whether it is found in the Statute Book or in the Decisions or is *unwritten*, the House of Lords and all the Subordinate Judiciary perform the same function, *i e.*, that of finding at what the *law is*. The argument that the finding out of an Act of Parliament is a question of fact will, therefore, apply to the other cases also where the Court has to declare rules of law for which evidence other than the Statute Book has to be relied on. Accordingly their Lordships dismissed the appeal as the case was governed by previous decisions whether right or wrong and refused to re-consider those decisions.

Construction of Statutes—Retrospective effect.

Young v. Adams [1898, A. C., 469].

The rule of construction, that no retrospective effect ought to be given to a statute unless an intention to that effect is expressed in the statute itself in plain and unambiguous language, had a signal application in this case. The respondent entered the service of the Government of New South Wales in the year 1885, as a road surveyor at a yearly salary. He continued in that employment till 1895, when he was summarily dismissed without compensation. In 1896, he sued the appellant for damages for wrongful dismissal. Five months after his dismissal, the New South Wales Act (59 Vic., Ch. 25, p. 58) had been passed and S. 58 of the Act enacted that "nothing in this Act or in the Civil Service Act of 1884 shall be construed or held to abrogate and restrict the right of the Crown as it had existed before the passing of the said Civil Service Act, to dispense with the services of any person employed in the public service." The appellant (Government) maintained that by virtue of this section they were entitled to dismiss any public servant at their pleasure as they had a right to do before the Civil Service Act of 1884. The Civil Service Act of 1884, had provided that the Government had no power to dismiss its servants except upon the grounds and after the inquiry which the Statute prescribed.

The Privy Council affirming the decision of the Court below awarding damages to the respondent held that the respondent who had been dismissed from the public service before the Act of 1895 came into force, but not in the manner prescribed by the Act of 1884, was not affected by the provisions of the later Act, which only applied to persons actually employed in the service at and after the date thereof. They accordingly overruled the contention of the Government.

Joint-debtors—Effect of judgment against one as regards the other.

McLeod v. Power [1898 II, Ch., 295].

The plaintiff sued defendants J. P. and H. P. for "2,000*l.* and delivery of 24,500 shares in the South African Saltpetre Fields, Limited, or their nominal value in cash, and 100*l.* damages for their detention or in the alternative . . . . . specific performance " of two agreements between the defendants and plaintiff. Both the defendants entered appearance and put in their written statements. Subsequently, however, H. P. admitted his liability in the action and consented to judgment being entered against him in full. In these circumstances, it was held by *Byrne*, J., that the suit should be dismissed as against the other defendant. His Lordship however disallowed J. P.'s costs on the ground that he had not specially pleaded the consent judgment as a defence to the suit immediately after the passing of that judgment

This is a curious and we believe the first application of the rule in *King* v. *Hoare* (1844, 13 M. N. W., p. 494) that a judgment against one of 2 joint-debtors is a bar to proceedings against another. *Byrne*, J., held that regard being had to the reason of the rule, it should be applied to cases like the present where both the joint-debtors are parties to the same action.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

A Treatise on Aliya Santana Law and Usage by Gangoolly Krishna Rao, B.A. LL.B., Printed at *the Codialbail Press, Mangalore*:—Price Rs. 2-8-0.

The Albany Law Journal for August (*in exchange*).

The Calcutta Weekly Notes for August (*in exchange*).

The Allahabad Weekly Notes for August (*in exchange*).

The Green Bag for August (*in exchange*).

The Canadian Law Times for July (*in exchange*).

The Canada Law Journal for July (*in exchange*).

The Educational Review for August (*in exchange*).

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The Bench and the Bar in Madras:—It is always a painful thing to have to notice any want of harmony in the relations between the Bench and the Bar and especially so if that occurs in the highest Court of the land. The local dailies have published accounts of some discreditable scenes in the Court over which Mr. Justice *Davies* has been presiding as the senior Judge. The language that the Judge has permitted himself to use detracts considerably from the dignity of the Bench, even supposing that the individuals who appeared before him merited the censure. But we must confess that, barring a certain amount of inaccuracy of speech, we could see nothing in the conduct of the practitioners concerned which could afford any justification for the very intemperate language employed by the Judge. Mr. Justice *Davies* has been generally credited with a great anxiety to do justice in every case that comes before him, but we do not know how he reconciles it with the violence of language which practically prevents the practitioner concerned from placing before the courts the facts and arguments which tell in favour of his client. The matter is likely to be looked at from a personal point of view, but we think there is a more serious aspect which ought not to be lost sight of. Language such as that which Mr. Justice *Davies* has thought proper to make use of is likely to interfere seriously with that free and fearless discharge of duty which is alike the glory of the profession and the safe-guard of the suitor's rights. A counsel walking into the court-house with an aching heart and a feeling of alarm in expectation of the presiding Judge coming down upon him at any moment is not likely to present the case of his client in the best possible light. And the whole theory upon which rests the English system of administering justice according to which the criminal in the dock upon a capital charge and the penniless claimant for an estate are afforded the privilege of legal assistance for the most favorable presentation of their case receives a rude shock when conduct such as that we have animadverted upon becomes the daily experience of professional men. For the sake of the dignity of the Bench and for the freedom of the Bar, and we may add, for the sake of justice, we hope there will be no recurrence of scenes like those which the local dailies have chronicled.

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Is Jaimini's Mimamsa an authority? In a case recently argued before the Privy Council, the question was the validity of the adoption of an only son. In the course of the argument, one of the Lords of the Judicial Committee appears to have put the question, whether Jaimini's Mimamsa had ever been followed as an authority. The question was, of

course, natural to a lawyer familiar only with the translations of the Hindu law books. Nor would the question appear surprising to most of the English Judges in India. But any person acquainted with the Sanskrit writers is likely to marvel at the question. The aphorisms of Jaimini's *Purva-Mimamsa* are the rules of interpretation, according to which every Sanskrit writer endeavours to construe the texts of the sages and are of the highest authority, as being the guides of every Commentator. It is, however, quite another thing to arrive at one's own interpretation of the texts in the light of the rules of the Mimamsa where Commentators of authority have placed a particular interpretation, professing to guide themselves by the same rules of the Mimamsa.

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Power of appointing District Munsifs. We would draw the attention of the High Court to the provisions of the Madras Civil Courts Act with regard to the appointments of District Munsifs and the control exercised over them. S. 7 of the Civil Courts Act empowers the High Court to appoint District Munsifs; and the High Court means all the Judges of the High Court, and not any one Judge possessing delegated authority. The power conferred under the Letters Patent, S. 36 and S. 13 of the Charter Act of exercising the original and appellate jurisdiction by Benches of one or more judges constituted by the Chief Justice has nothing to do with the appointments which the High Court is empowered to make by the Civil Courts Act or the superintendence exercised under it. Unless such appointments are made or such powers exercised by the whole High Court, they would seem to be of no legal validity.

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Patronage and Power of Superintendence exercised by the High Court:—Considerable dissatisfaction seems to be felt in the subordinate ranks of the judicial service at the way in which the High Court exercises its patronage and its powers of superintendence. There has been a practice of assigning this kind of work to a particular Judge, generally the senior civilian Judge. It would appear to be against the provisions of the law. That it is very undesirable will be accepted in case the individual entrusted with the duty happens to have strong idiosyncracies or is not particularly keen-sighted. The subordinate judicial service is entitled to the opinion of all the Judges for the time being of the High Court instead of being subject to the tender mercies of any one individual who being himself unequal to the careful discharge of his duties in that respect may rely too much upon subordinates without any high principles.

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Judge's Notes of Evidence :—We would draw the attention of *Sir Arthur Collins* and of *Mr. Justice Boddam* who are sometimes in the habit of speaking of Judge's notes as the property of the Judges of which parties are not entitled to copies to the following remarks of *Lindley*, M.R., in a case before the Court of Appeal which we take from the London Weekly Notes for 1898, No. 32, p. 77.

"It is desirable that Solicitors should know that, on an appeal in cases where evidence has been taken orally in the Court below, it is their duty to apply in good time for the Judge's Notes of Evidence. If they do so, they will generally be supplied by the Judge's clerk with copies of those notes; whereas if they apply, as is frequently done, just before the appeal is heard, there is no time to furnish such copies. The notes themselves are often difficult to read."

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Mr. Justice Boddam :—We would venture to make a suggestion to his Lordship Mr. Justice Boddam if his Lordship would deign to take it from us. It is said that Lord Mansfield advised a newly-appointed Colonial Judge never to give reasons for his decisions. This advice seems evidently to command the approval of his Lordship *Mr. Justice Boddam*, for we find his judgments, whether on the Original Side or on the Appellate Side, characterised by great brevity, especially on questions of law. Brevity has been said by high authority to be the soul of wit, but it may be carried to a point where the wit may be far from apparent. On the Original Side, his Lordship seldom records written judgments, unless we are to take his notes of the findings on the issues as judgments. We do not suggest that his Lordship should personally take the trouble of writing the judgments, but we can conceive no reason why he should not have his judgments taken in short hand by the stenographer of the Court. The practice of the learned judge is fraught with great disadvantage to suitors who may wish to appeal against his judgments and even more to those who may desire to support his judgments upon appeal. It is also a disadvantage to the Judges of the appellate court that they should be obliged to decide appeals without any knowledge of the reasons which have influenced the learned Judge in his decisions. Another feature of his Lordship's judgments is the absence of any indication of any examination of the authorities bearing upon questions of law. As member of the highest Court in the Presidency, as a member of a tribunal whose judgments should furnish a guide and a model to the numerous subordinate courts in the country, his Lordship is expected by the public and by the

profession to deliver judgments which shall be as learned as sound, *Mr. Justice Jenkins* has been in Calcutta for about the same time as *Mr. Justice Boddam*, but the former has already won a reputation for ability and learning as one of the ablest Judges of the Calcutta High Court. Judicial reputations have never been won whether in India or in England, by mere laconic statements of the net results of decisions. In justice to himself, in justice to the litigant public and the profession, and in justice to the interests of law, we hope his Lordship will not merely go deep into the learning of the various questions of law that come before him, but will also take pains to see that his judgments bear the clear and unmistakeable impress of careful research and sound consideration.

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Notes of American cases.

Signing an instrument in which the amount is written in pencil and leaving it with an agent for delivery is held, in *Walsh* v. *Hunt*, (Cal.) 390 L. R. A. 697, not to constitute such negligence as will render the maker liable to an innocent holder for the agent's forgery by raising the amount.

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A carrier that unloads goods during a storm on an open platform and leaves them unprotected from the weather because there is no building or agent at that place and the bill of lading provides for delivery on the platform at the risk of the owner is held, in *Allam* v. *Pennsylvania R. Co.* (Pa.) 39, L. R. A. 535, to be free from liability for injury to the goods, and such a contract is held not to be against public policy.

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Damages for mental anguish, independent of and unaccompanied by physical injury of any kind, are denied in *Peay* v. *Western Union Teleg. Co.* (Ark.) 39, L. R. A. 463.

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The fact that a wire charged with a dangerous current of electricity fell and caused injury is held, in *Snyder* v. *Wheeling Electrical Co.* (W. Va.) 90 L. R. A. 499, to make a *primâ facie* presumption of negligence, but not a conclusive one, as the misfortune may have occurred from inevitable accident.

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The mere naked assertion of the value of property by the vender to the purchaser during negotiation for a sale, though consciously untrue

and relied upon by the purchaser to his hurt, is held, in *Gustafson* v. *Rustemeyer* (Conn.) 39, L. R. A. 644, insufficient to constitute an actionable deceit.

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Under a power given to a wife to appoint another trustee instead of the one named in a trust deed executed by her husband for the benefit of the wife and her children, it is held, in *Stearns* v. *Fraleigh* (Fla.) 39, L. R. A. 705, that she may appoint the husband himself, if the former trustee resigns.

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Insurance on wearing apparel, jewelry, etc., contained in a specified building is held, in *British America Assurance Co.* v. *Miller* (Tex.) 39, L. R. A. 545, not to cover the property at another place where the family was temporarily staying, although they went there periodically, as the agent knew.

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To publish that a debtor pleaded the statute of limitation, and to say that this is dishonest, is held, in *Hollenbeck* v. *Hall* (Iowa) 39, L. R. A. 734, insufficient to constitute a libel.

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The immaturity of a debt at the time of the debtor's death is held, in *Ainsworth* v. *Bank of California* (Cal.) 39, L. R. A. 686, insufficient to prevent its set-off against a claim due to the estate, if it is mature at the commencement of the action.

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A ruling in favor of the claim of proponents of a will, that its formal execution is to be as seemed, is held, in *Re Stetson's Will* (Mas.) 39, L. R. A. 715, insufficient to prevent them from subsequently calling the subscribing witness to testify to its execution. With this case is a note on opinions of subscribing witness as to sanity or insanity.

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Ice not a necessity in the administation of Justice:—It has just been judicially decided that ice is not a necessity in the administration of justice. The Superior Court, in *Commecial Ice Co.* v. *City of Philadelphia*, decided that ice for cooling water in the offices of the register of wills and clerk of the Orphans' Court in Philadelphia is not one of the "things necessary for the proper furnishing of the offices of the register of wills and the rooms of the Orphans' Court," for which, under the Act

of April 25, 1889, P. L. 52, the City of Philadelphia would be liable. "To reverse the action of the Court below," says the Superior Court, "would require us to determine judicially that the providing of ice is necessary for such furnishing. This we are not prepared to do. We construe the language of the act to cover only those things which, if absent, would obstruct or prevent the proper conduct of business of the offices of the register of wills and of the said Courts. While the use of ice may have come to be so prevalent as to make it to many people more than a luxury, we cannot hold that it is *necessary* to a proper furnishing of a public office or Court-room." Good Judges will doubtless disagree on the point herein decided. Circumstances in which the lack of ice would obstruct or prevent the proper conduct of business in the aforesaid Courts can be easily imagined, as, for instance, where an attache has succumbed to the torrid climate of Philadelphia in July. Water being a prime necessity, it would follow that it ought to be furnished in palatable condition. However, the doctors may differ, just as they probably would as to whether sugar is a necessity in the matutinal oatmeal or coffee :—*The Albany Law Journal.*

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A Connecticut Judge is reported to have instructed a jury in the following language: "Gentlemen, you have heard the evidence. The indictment charges the prisoner with stealing a jackass. This offence seems to be becoming a common one. The time has come when it must be stopped; otherwise, gentleman, none of you will be safe." :—*The Albany Law Journal.*

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A prisioner, an old offender, was tried at Ennis on the last day of the Assizes for country Clare, Iriland. He was charged with highway robbery, and was, to the surprise of the bench, acquitted. The chief baron thus intimated to the jury his view of the verdict. "Is there," he inquired, "any other indictment against this *innocent* man?" "No, my Lord," was the reply. "Then tell the gaoler not to let him loose till I get *half an hour's start* of him, for I'd rather not *meet him on the road.*"—*Law Times (London).*

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Lord Russell of Killowen, years before he took silk, was sitting in Court, when another barrister, leaning across the benches during the hearing of a trial for bigamy, whispered: "Russell, what's the extreme

penalty for bigamy?" "Two mothers-in-law," replied Russell, without hesitation. *The Albany Law Journal.*

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A *Royal Warrant*, which was published in the *London Gazette* last Monday, though issued in March, at last gives to the children of all Lords of Appeal precedence immediately after the younger children of hereditary Barons, and the right to use the prefix 'Honourable.' The warrant finishes an interesting chapter in constiutional history. More than forty years ago it was necessary to strengthen the judicial element in the House of Lords, and Lord Cranworth thought that this could be done by the creation of life Peers, a step for which there were some doubtful precedents. Sir James Parke was therefore in 1856 created Baron Wensledale and a Peer for life; but after much discussion the House of Lords resolved, on the recommendation of the Committee of Privileges, that the grant did not enable the grantee to sit and vote in Parliament. The Government made no attempt to oppose the resolution, and a hereditary Peerage was conferred on Lord Wensledale. Here the matter rested until the Appellate Jurisdiction Act, 1876, gave the Crown power to appoint four Lords of Appeal who were entitled to sit and vote in Parliament, but only during the tenure of their office, though they retained the rank of Baron for life. A Royal Warrant gave their wives the title of Baroness, but no title or precedence was given to their children. In 1887, when Lord Blackburn, retired, it was considered desirable that his valuable services, and those of other Law Lords, who might follow his example, should not be entirely lost. The Appellate Jurisdiction Act of that year made them members of the House of Lords for life, thus converting them into life Peers in the true sense of the word.—*The English Law Journal.*

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The *London Gazette* announces that the Queen has been pleased to issue a warrant declaring 'with respect to all the surviving children of the undernamed persons, all of whom either were formerly or are now Lords of Appeal in Ordinary, namely Colin Blackburn, Lord Blackburn, deceased; Edward Strathearn Gordon, Lord Gordon of Drumearn, deceased; John David Fitzgerald, Lord Fitzgerald; deceased; William Watson, Lord Watson; Edward Macnaghten, Lord Macnaghten; Michael Morris, Lord Morris; James Harmen, Lord Harmen, deceased; Charles Synge Christopher Bowen, Lord Bowen, deceased; Charles Russell Lord Russell of Killowen (now Lord Chief Justice of England); and Horace Davey, Lord Davey; as also with respect to the children of any

Lord of Appeal in Ordinary hereafter to be appointed and created a Lord of Parliament for life; that such children shall have and enjoy on all occasions the style and title enjoyed by the children of hereditary Barons of these our realms, together with the rank and precedence next to and immediately after the younger children of all hereditary Barons now created or hereafter to be created, and immediately before all Baronets.'—*The English Law Journal.*

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Circuit by Judges:—It is a mutual advantage for the Judges to know the provinces, and for the provincials to know Her Majesty's Judges. Their presence serves as a useful civic lesson for the provincial public, more accustomed to be left to the tender mercies of Quarter Sessions and Country Courts, and forms a standard to which the administration of justice can be raised in the public view. For this reason it is a matter of regret that the Lords Justices cannot take their turn, say once a year, at civil assizes. They would thereby keep in touch with work at Nisi Prius, while they themselves would not be lost to sight though to legal memory dear, a phrase which inevitably escapes one at the thought that Lord Justice Vaughan Williams and Lord Justice Collins can no longer be numbered among the visible planets in the circuit orbit.

Comment is frequently made on the assumed pettiness of a large proportion of the causes tried at assizes. The answer to that is two-fold. First, it is not for Judges or busy lawyers to estimate what is worth trying, or to consider that such intellectual persons as themselves should only be called upon to deal with important causes. This fallacious idea is based on the assumption that certain Courts are to be deemed "Inferior Courts" on account of the smallness of the subject-matter in dispute to be dealt with by them. The notion is one derogatory to the administration of justice. Courts, whether "Superior" or "Inferior," are constituted to sit and to try whatever disputes individuals may choose to bring before them. Courts are made for suitors, not suitors for Courts. Knowledge by the public that their grievances, real or imaginary to themselves, will be heard and dealt with by skilled lawyers, is of more advantage to the community, and tends to a clearer recognition of the principles of law and order than any "getting through the business" within the shortest possible time. No doubt there is a *via media* whereby a tactful Judge and wise "counsellors" can settle unnecessary disputes but care should be taken that the settlement should be a genuine solatium to all parties and not the forcible "pooh-poohing"

of a case out of Court, a course of action which often merely leaves a rankling sense in the minds of both parties that they have not had a fair hearing from a Court which they themselves have (indirectly) paid for that very purpose. The way in which a case is tried is of greater importance than the subject-matter in dispute, so far as the maintenance of trust in and respect for the administration of justice is concerned ;—*The Law Magazine and Review.*

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Injunction to Restrain an Unlicensed Person from Practising Law.—We learn from the *Chicago Legal News*, (30 Chic. Leg. News, 374.) that a bill in equity was recently filed in the Circuit Court of Cook County, Illinois, by Charles S. Deneen, the State's Attorney, to restrain one B. A. L. Thomson from practising law without procuring a license so to do. The entire bill is printed in the *Legal News.* The action strikes us as being novel. The general rule is that injunctions lie only to protect private rights of property or business. A well recognized exception to the rule is that, in two or three limited classes of cases, injunctions are granted on informations filed by the Attorney-General or other attorney for the government to restrain purprestures of highways, navigations, and the like. This jurisdiction has grown until the injunction is more frequently resorted to than in former times to restrain indictable public nuisances. We do not understand any ground on which the present bill can be supported, unless it be on this last ground, that is to say, upon the ground that, for a person to engage in the practice of law without being duly licensed thereto, is to engage in the commission of a series of acts in the nature of a public nuisance. But is not the case one where there is a plain remedy at law, and where the jurisdiction of equity cannot consequently be invoked? If an unlicensed person files a pleading in court and signs his name to it as an attorney, does he not commit a contempt of court? On the other hand if, being really learned in the law, he gives advice and draws a pleading and procures it to be filed by some person who is an authorized attorney, does he commit an unlawful act? For example, would it be unlawful for a distinguished professor of law in one of our universities to give legal advice, and even to draw a pleading or any other legal paper, so that it be not filed or used of record except by a duly licensed attorney who appears as the attorney of record? We do not believe that the principles of the law put any such restriction upon freedom of action. If we are wrong in this, then it is to be said that the American bar is little better than a medieval guild, and is as odious as a modern business trust ;—*The American Law Review.*

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Zola's Defence: His Impassioned, Dramatic, and Patriotic Appeal to the Jury.—The following are concluding passages of M. Zola's remarkable address to the jury in his first trial as printed in the verbatim report of the London *Times*:—

I am not defending myself, moreover. I leave history to judge my act, which was a necessary one; but I affirm that the army is dishonored when gendarmes are allowed to embrace Major Esterhazy after the abominable letters written by him. I affirm that that valiant army is insulted daily by the bandits who, on the plea of defending it, sully it by their degrading championship, who trail in the mud all that France still honors as good and great. I affirm that those who dishonor that great national army are those who mingle cries of "Vive l'armèe!" with those of "A bas les juifs!" and "Vive Esterhazy!" Grand Dieu! the people of Saint Louis, of Bayard, of Condè and of Hoche, the people which counts a hundred great victories, the people of the great wars of the republic and the empire, the people whose power, grace and generosity have dazzled the world, crying "Vive Esterhazy!" It is a shame the stain of which our efforts on behalf of truth and justice can alone wash off.

You know the legend which has grown up. Dreyfus was condemned justly and legally by seven infallible officers whom it is impossible even to suspect of a blunder without insulting the whole army. Dreyfus expiates in merited torments his abominable crime. And, as he is a Jew, a Jewish syndicate is formed, an international "sans patrie" syndicate disposing of hundreds of millions, the object of which is to save the traitor at any price, even by the most shameful intrigues. And thereupon this syndicate began to heap crime on crime, buying consciences, casting France into a disastrous agitation, resolved on selling her to the enemy, willing even to drive all Europe into a general war rather than renounce its terrible plan.

It is very simple, nay childish, if not imbecile. But it is with this poisoned bread that the unclean press has been nourishing our poor people now for some months. And it is not surprising if we are witnessing a dangerous crisis, for when folly and lies are thus sown broadcast you necessarily reap insanity.

Gentlemen, I would not insult you by supposing that you have yourselves been duped by this fairy tale. I know you; I know who you are. You are the heart and the reason of Paris, of my great Paris, where I was born, which I love with an infinite tenderness, which I have been studying and writing of now for forty years. And I know

likewise what is now passing in your brains; for, before coming to sit here as defendant, I sat there on the bench where you are now. You represent there the average opinion; you try to illustrate prudence and justice in the mass. Soon I shall be in thought with you in the room where you deliberate, and I am convinced that your effort will be to safeguard your interests as citizens, which are, of course, the interests of the whole nation. You may make a mistake, but you will do so in the thought that while securing your own weal you are securing the weal of all.

I see you in your families at evening under the lamp; I hear you talk with your friends; I accompany you into your factories and shops. You are all workers, some tradesmen, others manufacturers, some exercising liberal professions. And your very legitimate anxiety is the deplorable state into which business has fallen. Everywhere the present crisis threatens to become a disaster. The receipts fall off; transactions become more and more difficult. So that the idea which you have brought here, the thought which I read in your countenances, is that there has been enough of this and that it must be ended. You have not gone the length of saying, like many, "What matters it that an innocent man is at the Ile du Diable? Is the interest of a single man worth thus disturbing a great country?" But you say, all the same, that the agitation which we are raising, we who hunger for truth and justice, costs too dear. And if you condemn me, gentlemen, it is that thought which will be at the bottom of your verdict. You desire tranquillity for your homes, you wish for the revival of business, and you may think that by punishing me you will stop a campaign which is injurious to the interests of France.

Well, gentlemen, if that is your idea, you are entirely mistaken. Do me the honor of believing that I am not defending my liberty. By punishing me you would only magnify me. Whoever suffers for truth and justice becomes august and sacred. Look at me. Have I the look of a hireling, of a liar, and a traitor? Why should I be playing a part? I have behind me neither political ambition nor sectarian passion. I am a free writer, who have given my life to labor, who will to-morrow re-enter the ranks and resume my suspended task. And how stupid are those who call me the Italian; me, born of a French mother, brought up by grandparents in the Beauce, peasants of that vigorous soil; me, who lost my father at seven years of age, who did not go to Italy till I was fifty-four. And yet I am proud that my father was from Venice, the resplendent city whose ancient glory sings in all memories. And even if I were not French, would not the forty volumes

in the French language which I have sent by millions of copies throughout the world suffice to make me a Frenchman ?

So, I do not defend myself. But what a blunder would be yours if you were convinced that by striking me you would re-establish order in our unfortunate country ! Do you not understand now that what the nation is dying of is the obscurity in which there is such an obstinate determination to leave it ? The blunders of those in authority are being heaped upon those of others ; one lie necessitates another, so that the mass is becoming formidable. A judicial blunder was committed and then to hide it a fresh crime against good sense and equity has had daily to be committed. The condemnation of an innocent man induced the acquittal of a guilty man, and now, to-day, you are asked in turn to condemn me because I gave utterance to my pain on beholding our country embarked on this terrible course. Condemn me, then. But it will be one more fault added to the others, a fault, the burden of which, you will bear in history. And my condemnation, instead of restoring the peace for which you long, and which we all of us desire, will be only a fresh seed of passion and disorder. The cup, I tell you, is full ; do not make it run over.

He concluded as follows :—

Dreyfus is innocent. I swear it. I stake my life on it—my honor. At this solemn moment, in the presence of this tribunal which is the representative of human justice, before you, gentlemen, who are the very incarnation of the country, before the whole of France, before the whole world, I swear, that Dreyfus is innocent. By my forty years of work, by the authority that this toil may have given me, I swear that Dreyfus is innocent. By all I have won, by the name I have made for myself, by my works which have helped for the expansion of French literature, I swear that Dreyfus is innocent. May all that melt away, may my works perish if Dreyfus be not innocent. He is innocent. All seems against me—the two Chambers, the civil authority, the most widely circulated journals, the public opinion which they have poisoned. And I have for me only the idea, an ideal of truth and justice. But I am quite calm ; I shall conquer. I was determined that my country should not remain a victim of lies and injustice. I may be condemned here. The day will come when France will thank me for having helped to save her honor :—*The American Law Review.*

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Negligence of Telegraph Company ; Delay in Delivering Message—Summoning of Surgeon—Proximate Cause for Jury.—In *Western Union*

Telegraph v. *Morris*,—83 Fed. Rep. 992, the United States Circuit Court of Appeals for the Eighth Circuit, in an opinion by Thayer, J., hold that where the testimony of a physician tends to show that a surgical operation might have been avoided, had he reached the patient earlier, it is not error to submit to the jury the question as to whether or not the failure of a telegraph company to properly transmit a message, whereby the physician was prevented from earlier attendance, was the proximate cause of the injuries resulting from such operation:—*The American Law Review.*

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Practice in United States Courts: Taking Deposition—Misconduct of Counsel in Instructing his Witnesses not to Answer.—In the case of *Thomson-Houston Electric Co.* v. *Jeffrey Man. Co.*,—87 Fed Rep. 614, it was held that in taking depositions in an equity suit, counsel cannot assume to pass upon questions of the competency, materiality, and relevancy of testimony, and instruct his witnesses not to answer questions put to them on cross-examination; and where a witness, in obedience to such instructions, refuses to answer, his entire deposition will be stricken from the files:—*The American Law Review.*

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Wife: Right to Action for Inducing Husband to Desert Her.—In the case of *Gernerd* v. *Gernerd*, 39 Atl. Rep. 884, the Supreme Court of Pennsylvania held that, since the statute removing the disabilities of married women, a wife may maintain an action againt one who has wrongfully induced, her husband to leave her. In the opinion of the court written by Fell, J., the reason and learning of the subject are condensed in the following passages;—

The right of a husband to maintain an action against one who has wrongfully induced his wife to separate from him seems not to have been doubted since the case of *Winsmore* v. *Greenbank.* Willes, 577. The right of a wife to maintain an action for the same cause has been denied, because of the common-law unity of husband and wife, and of her want of property in his society and assistance. There was certainly an inconsistency in permitting a recovery when her husband was a necessary party to the action, and she had no separate legal existence or interest, and the damages recovered would belong to him, but the gist of the action is the same in either case. There is no substantial difference in the right which each has to the society, companionship, and aid of the other and the injury is the same whether it affects the husband or the wife.

Where the wife has been freed from her common-law disabilities, and may sue in her own name and right for torts done her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her. Generally, this right has been recognized and sustained in jurisdictions where she has the capacity to sue:—*The American Law Review.*

REVIEWS.

Tudor's Leading Cases on Real Property, Conveyancing, Construction of Wills, etc., 4th Edition, by T. H. Carson and H. B. Bompas, published by *Butterworth and Co., 7, Fleet Street, London, E. C.*:—Price, £2-10-0. Tudor's Leading Cases on Real Property is a standard law book; and it needs no words of introduction to commend it to our readers. We may, however, note that the editors have taken great pains in bringing out this edition and have given it almost the appearance of a new book. The changes appear to us to be all well-conceived. The editors have exercised a sound judgment in the omission of cases which are mere old learning and in the curtailment of the notes. That a thousand new cases have been added in the notes and yet the size of the book has been reduced by more than two hundred pages proves unquestionably the value of the editorial labor.

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Part IX.] SEPTEMBER, 1898. [Vol. VIII.

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ISLANDS IN NON-NAVIGABLE RIVERS.

The ownership of islands formed in non-navigable and non-tidal rivers has but rarely come into question before the Courts of this Presidency. There have been several cases in Bengal dealing with this subject and they have been decided with reference to the provisions of the Bengal Regulation XI of 1825. Though the question is one of very great importance to riparian proprietors in the Godavari and Krishna deltas, and though the ownership of such islands commonly called *lankas* has been the cause of bitter disputes among them [*vide* Godavari Manual, Ch. I., p. 5] it is somewhat surprising that there should be such a paucity of decisions upon the point. We have been able to discover only two decisions of the High Court and one decision of the Sudder Court upon the point. The earliest decision is that of the Sudder Court in the *Komarazu Lanka* case [*vide* Mad. Sud. Dec. (1858) 189]. In this case the Government was an upper riparian proprietor in the Godavari and was the owner of a *lanka* up the stream. In course of time the *lanka* extended itself down the stream beyond the limits of the Government villages on the bank. The new accretions were within the limits of a Zemindari village on both sides of the river. The new accretion was claimed by the Government on the ground that it was a longitudinal accretion to their old *lanka*, and by the Zemindar on the ground that it had been formed within the limits of his estate on the two sides of the river. The case came up before three Judges of the Sudder Court and the Zemindar's contention was unanimously upheld. It was decided that the island should be divided between the Government and the Zemindar in proportion to their frontage upon the river. The next case was *Subbaya* v. *Yerlagedda Ankinidu*, 1 M. H. C. R., 255, decided by *Holloway* and *Strange*, JJ. In this case it was held that the Zemindar was entitled to islands formed in the river Krishna within the limits of his estate. The last case upon the subject

is *Ramalakshmamma* v. *The Collector of Godavari*, 7 M. L. J. R., 246, decided by *Collins*, C. J. and *Parker*, J. In this case, the facts were very similar to the *Komarazu Lanka* case, but by some oversight no reference is made to that case either in the arguments of counsel or in the judgment. The decision of *Holloway*, J., in 1 M. H. C. R., 255, was quoted in argument, but passed over in the judgment. In this case also, the Government was the the upper riparian proprietor and the Zemindarni was the lower riparian proprietrix. It was conceded for the Government that the *lanka* in dispute fell within the boundaries of the plaintiff's estate on both sides of the river. The Government contended that the *lanka* belonged to them on the ground that it was formed in a tidal navigable part of the river, and on the ground that the *lanka* in dispute was an accretion to an existing *lanka* also within the boundaries of the Zemindarni's estate, but acquired by the Government by adverse possession against the predecessor in title of the Zemindarni. The first ground of claim set up by the Government was negatived by the High Court. But the second ground was upheld. With every deference to the learned Judges, we cannot help thinking that the decision is erroneous.

It must be stated at the outset that there is no provision of statutory law applicable to the subject. Bengal Regulation XI of 1825 does not apply to this Presidency. The case, therefore, has to be decided in accordance with the general principles of equity and justice which have on numerous occasions been held by the Judicial Committee to be identical with the principles of the English Law, unless there is anything in such principles which by reason of its purely local or historical origin renders them unsuitable for application to India or unless different principles have been specially laid down for this country by the Judicial Committee or the Courts of this country.

The reasoning of the High Court may be summarized as follows :—

(1) That great caution should be exercised in applying to India the rule of English Law that a riparian proprietor is *primâ facie* the owner of the bed of a non-tidal navigable stream *ad medium filum*, that rivers of the type of the Godavari and the Krishna resemble the American rather than the English rivers and that as some of the American States have not adopted the

Common Law rule in its entirety, the Courts in India also may hesitate to adopt it.

(2) That the rule of English Law about river-beds is a presumption which may be rebutted by showing that the soil of land covered with water has been conveyed and specially appropriated to a third person, whether or not he is a riparian proprietor.

(3) That the Government had admittedly acquired a right to the Lanka of Tatapudi which had thrust itself as a wedge into the area of the bed claimed by the plaintiff. The title of the Government to this wedge of land within the limits of the plaintiff's bed displaced the presumption of the plaintiff's ownership not merely to that wedge, but also to all formations which had grown by contact with, or adherence to, that wedge of land.

(4) That the suit *lanka* being a gradual accretion to the Tatapudi Lanka was not a sudden vertical accretion in the bed of the river.

(5) That the doctrine of alluvion must be applied even to vertical accretions in the bed of a river or in mid-stream, unless they were sudden.

(6) That for the purpose of applying the doctrine of alluvion, it made no difference whether the accretion adjoined the bank or was in mid-stream.

The first and most important question to be discussed in the case related to the ownership of the bed of the Godavari at the place in dispute. The river had been found to be at this point not tidal and navigable. Under the English Law (1) there can be no doubt that the ownership of the bed of a river which is not tidal and navigable vests in the riparian proprietors on the two sides of the river. In some of the American States (2) the rule of the English

(1) See Coulson and Forbes on "The Law of Waters," pp. 92, 95; *Bickett* v. *Morris*, L. R. I. H. L. Sc. Ap. 47; Hale's De Jure Maris, p. 1, ch. 1; Hargrave's Law Tracts, 1.

(2) The rule of E. L. was not adopted in *Barney* v. *Keokuk* (1876) 4. U. S. Rep., pp. 324, 338; *St. Louis, etc. R. Co.* v. *Ramsey* (1890) 22 Amer. St. Rep. 195; *Notes to Miller* v. *Mendenhall* (1890) 19 Amer. St. Rep. 226; *Willes* v. *Bailey* (1887) 3 Amer. St. Rep. 48.

The rule of E. L. was adopted in the following cases: Notes to *Arnold* v. *Mundy* (1821) 10 Amer. Dec. 385; *Deerfield* v. *Arms* (1835) 28 Amer. Dec. 276, 277; *McCollough* v. *Wall* (1850) 53 Amer. Dec. 715; *Walker* v. *Shepardson* (1855) 65 Amer. Dec. 325; *City of Grand Rapids* v. *Powers* (1891) 28 Amer. St. Rep. 276.

Common Law has not been adopted in its entirety, while in the majority of jurisdictions it has been so adopted. While the English Courts apply the two tests of tidality and navigability, the Courts of some of the States have dispensed with the test of tidality and held that navigability is sufficient to vest the ownership of the bed in the State. The reasons for this departure are said to be

(1) That while tidality and navigability co-exist in England, many of the great rivers in America are navigable for a considerable part of their course without being at the same time tidal.

(2) That the same necessity for public control over the highways of commerce and navigation should lead to the recognition of the right of the State to the beds of all rivers which are navigable, whether they are above or below the ebb and flow of the tide.

The origin of the doctrine according to which the ownership of the beds of tidal and navigable rivers is vested in the Crown is involved in some obscurity and doubt. If the doctrine originated in considerations of public policy, in the expediency of exercising public control over the passage-ways of commerce and navigation, the rule may perhaps be applied to navigable waters above the ebb and flow of the tide. But notwithstanding the fact that these considerations of public policy have been emphasized in several of the cases declaring the right of the State to the ownership of the bed, it does not seem to be necessary for the protection of the interests of the public, that the State should be regarded as the owner of the bed. Even in the case of rivers which are not navigable in any sense of the term, the rights of the riparian proprietors to the bed of the stream would undoubtedly be subject to the exercise of public rights.(1) The Courts of those States in America which have adopted the rule of the Common Law have, therefore, felt no difficulty in recognising a servitude in favour of the public, even in the case of rivers whose beds are vested in riparian proprietors. Where a rule of law is already established, an inquiry into the

(1) *Bickett* v. *Morris*, L. R. I. H. L. Sc. Ap. 47; *Coulson and Forbes*, p. 95.

reasons which led to its adoption may not be very necessary or useful. But when a question arises as to the modification or extension of the rule, it is necessary to consider whether any suggested departure from the rule is justified by the reasons advanced in support of it. The importance of securing to the public a right of user over the great water-courses for purposes of irrigation or navigation has led many people to suppose that the object can only be secured by declaring the right of the State to the ownership of the bed. On the other hand, the public purposes to be served can be equally well served by declaring the right of the State to a servitude merely, as against the riparian proprietors for all such purposes.

If, as we have shown, the interests of the public can be effectually protected even under a rule which regards the riparian proprietor as the owner, and if it is probable that the ownership of the Crown in the beds of tidal and navigable rivers was based upon the fact that they were regarded as the arms of the sea and the King was regarded as the owner of 'the great waste' the sea,(1) there is no reason for extending the doctrine of the proprietorship of the State to rivers above the influence of the tide.

There is thus no reason for refusing to extend to this country the rule of the English Common Law. The Courts of this country have in all cases in which they could find no special rule of statutory law or custom freely applied the rules adopted by the English Courts. And in regard to the question of alluvion and the respective rights of the Crown and of riparian proprietors, it was held by the Madras High Court that the rules of English Law were applicable in British India.(2) In *Nogender Chunder Ghose* v. *Mahomed Esof*, 10 B. L. R., 406, the Judicial Committee observe that the law of alluvion in America seemed to be less favourable to riparian proprietors than that of India or England, thereby implying that the law in America, in so far as it was against the riparian proprietor and at variance with the English Law, should not be applied to India. In the particular case before them their Lordships no doubt observe that in India there is no distinction between tidal and non-tidal but navigable rivers, as regards the proprietor-

(1) Hale's De Jure Maris Hargrave's Law Tracts, 10.

(2) See *Secretary of State* v. *Kadirikutti*, I. L. R., 13 M., 369.

ship of the river. But the case was one from Bengal and their Lordships evidently had in their minds the provisions of Regulation XI of 1825 which recognised no such distinction.

This distinction between a tidal and a non-tidal but navigable river was one which did not arise in this case.

To constitute a river navigable(1) it must be so at all times and seasons for vessels of fairly large size, and must be a continued highway over which commerce is or may be carried on in the customary mode in which commerce is conducted by water. It was clear from the evidence of the Port Officer that the river could not be regarded at the point in question as navigable in fact, within the meaning of the expression as defined by the authorities. If it was not navigable in fact, there could be no doubt the ownership of the bed belonged to the riparian proprietors, whether according to English Law or American Law.(2)

It follows from what has been said before that the bed of the river at the disputed locality was the property of the plaintiff as the riparian proprietor on both sides of the river.

If the bed of the river, in so far as it was comprised within the limits of the plaintiff's estate belonged to her, who was entitled to the suit *lanka* which had been formed in mid-stream on the portion of the bed belonging to her? All formations on the portion of the bed belonging to her were also the plaintiff's property and her right to them could not be in any way affected by the fact that at some previous time her predecessor allowed the defendant to acquire by adverse possession a particular strip of land within her portion of the bed. The fact that the defendant had held adverse possession of that strip for the statutory period could confer ownership only of the specific extent of land which had been held adversely. It could not by any means confer upon the defendant any right to the

(1) See *Chunder Jaleez* v. *Ram Chunder Mookerjea*, 15 W. R. 212 and 215; *Mohini Mohun Das* v. *Khajah Ahsanoollah*, 17 W. R. 73; *Rex* v. *Montague*, 4 B. & C. 598; *Mayor of Lynn* v. *Turner*, 1 Cowper, 35; *Miles* v. *Rose*, 5 Taunton 705; *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339.

(2) *Welles* v. *Bailey* (1837) 3 Amer. St. Rep. 48; *Wiggenhorne* v. *Kauntz* (1888) 8 Amer. St. Rep. 150 *Arnold* v. *Mundy* (1821) 10 Amer. Dec. 350; *Brown* v. *Chadbourne* (1849) 50 Amer. Dec. 641; *Ingraham* v. *Wilkinson* (1826) 16 Amer. Dec. 342; *Walker* v. *Shepardson* (1855) 65 Amer. Dec. 225; *Kalee Kishen Tagore* v. *Judoo Lall Mullick*, 5 C. L. R. 97; *Chagendra Narain* v. *Matangini*, 17 I. A. 62.

remaining portion of the bed vested in the plaintiff or to any formations upon the same. Suppose the plaintiff had granted a conveyance of this particular strip of land in the middle of the river to the defendant. Could it be doubted for a moment that the ownership of the remainder of the bed would be reserved to, and vested in, the plaintiff? For the purpose of this question, there cannot possibly be any difference between the operation of limitation and the operation of a grant. In either case what is acquired is only a specific extent of land and the owner of the remaining portion of the bed cannot be deprived of his right thereto or to any part thereof except by a fresh assumption of adverse possession continued for the statutory period, or a fresh grant or some other act of a similar description.*

The claim of the Government to the suit *lanka* could not thus be supported on the ground of any right to the ownership of the bed on which the new *lanka* was formed. The decision of the High Court in favour of the Government was based upon the theory of lateral accretion to the old *lanka* belonging to the Government. The theory of lateral accretion, however, has been affirmed by the highest authority to have no applicability to formations on beds belonging to private owners.

In regard to formations in the beds of rivers whether adjacent to the bank or detached from it, there are two principles of law laid down by the authorities.

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*The formation of an island in mid-stream will in no way affect the rights of the riparian proprietors on either side of the river. If an island is formed on one side of the median line of a river, the owner of the nearer bank who will also be the owner of the island, is not entitled as the owner of such island to a moiety of the bed of the river intervening between the island and the opposite bank. The right of the opposite proprietor to a moiety of the bed of the whole river, which he possessed before the formation of the island cannot be affected by such formation.

If the owner of the island makes a grant of it to a stranger it is certain that the right of the opposite proprietor cannot be affected any more than in the last case. If the grantee of the island cannot be regarded as a riparian proprietor so as to enable him to claim a moiety of the bed between the island and the opposite bank, there is no reason

One is the doctrine of lateral accretion and the other the doctrine of re-formation, or, to speak more correctly, the doctrine of vertical accretion. So far as this country is concerned, it has been established by the Privy Council in a series of decisions based upon the principles of natural law and justice, that in cases of conflict the doctrine of lateral accretion must give way to the doctrine of vertical accretion. In many cases the application of the two doctrines would lead to the same result, as, for instance, where a riparian proprietor is owner of half the bed and an accretion is made adjoining his bank. He would be entitled to the accretion, whether on the ground that it is formed on his portion of the bed, or on the ground that it has adhered to his bank. There are other cases, however, in which the application of the two doctrines would lead to different results. And in such cases, the Courts in India are now bound to follow the decisions of the Privy Council.

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why he should be regarded as such on the side of the island nearer to the grantor. But if there is any difference at all between his rights on one side of the island or the other, it must depend upon the fact that the grantor being the owner of the whole bed between his bank and the island would have been competent to transfer any portion of it and might have intended to transfer a moiety of the bed between his bank and the island. Whether such an intention could be ascribed in the absence of express words in the grant would be a question of fact. In the absence of any circumstances to indicate the grantor's intention it may perhaps be presumed by the Court that he intended to transfer a moiety of the bed separating the island from his bank. Any rule, however, to this effect can be based upon nothing more than the presumable intention of the parties. Such an intention cannot be suggested in the case of a person who allows his title to a part of the land to be extinguished by adverse possession. It would be preposterous to suggest that a person who allows a portion of his land to be acquired by limitation by a stranger entertains the intention of forfeiting or abandoning his claim to the other portion also.

Assuming for a moment that a person who is the owner of an island can be regarded as the riparian proprietor for the purpose of laying a claim to the bed *ad medium filum* he cannot clearly be treated as such lower down than the length of his island any more than a riparian proprietor on the main bank of a river can be regarded as the riparian proprietor at any point lower than the length of his estate.

In *Felix Lopez* v. *Madun Thakoor*, 13 M. I. A., 467, the plaintiff owned an estate on the banks of the Ganges. It was wholly submerged by the continued encroachment of the river and the defendant's land became the river boundary. After the lapse of some years, the river ultimately retired and the land became capable of cultivation. The defendant claimed the land as a gradual lateral accretion to his land, while the plaintiff claimed it as a re-formation on his site. The Bengal High Court rejected the plaintiff's claim, but it was upheld by the Judicial Committee. It must not be imagined that there is any magic in the word re-formation or that, to render the ruling of the Privy Council applicable, it is necessary that a person's land should be first above water, then be submerged and then re-appear above the surface of the water. The reasoning and language of their Lordships are just as much applicable to the case of land always under water and ascertained to belong to a definite owner and for the first time rising above the surface of the water by the addition of deposits. The reason why the word "re-formation" is used in these cases is that the Ganges being a navigable river, there could be no private ownership in the bed under the law in Bengal, and the person who invoked the doctrine of vertical accretion could have claimed the new formation not upon the ground that the bed belonged to him, but only upon the ground that the site which was not originally included in the bed belonged to him before it was submerged.

So long as the ownership of the site can be ascertained and so long as there is nothing to indicate any intention on the part of the owner to abandon it, any formation upon the site must belong to the owner of the site. The doctrine of lateral accretion can not be applied so as to take away one man's property and give it to another, simply because the land of the former happened to be under water. The principle is thus put by their Lordships:—"This principle is a principle not merely of English, not a principle peculiar to any Municipal law, but a principle founded on universal law and justice; that is to say, that whoever has land, *wherever* it is, whatever may be the accident to which it is exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property remains in the original owner." The

doctrine of lateral accretion laid down by S. 4 of the Bengal Regulation was held not to justify the confiscation or destruction of a private person's property and not to be applicable to the case of a formation on a site ascertained to belong to a third person. Their Lordships point out that the doctrine could be applied only to the gain which an individual proprietor might make in this way from that which was part of the public domain not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State. And if the term accretion is to be applied to the formation in question, their Lordships ask "why a deposit of alluvion directly upon a site should not be regarded at least as much an accretion and annexation vertically to the site, as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property." The case, it must be remembered, was decided by their Lordships not upon the provisions of the Bengal Regulation XI of 1825 which was held inapplicable, but upon general principles of equity and justice.

The next case before their Lordships was *Pahalwan Singh* v. *Maharaja Muhessur*, 9. B. L. R., 150. In this case the question was whether the disputed lands had been gradually washed away and had accreted to the estate of the plaintiff by obliteration of its former marks, or whether by the sudden change of the Ganges they had accreted with a continuance of the former marks. Their Lordships point out that it would be an error to hold that the complete obliteration of all marks was conclusive of accretion. If any marks of the old channel, houses, or trees could have been found, it would, of course, have been conclusive against the plaintiff, but the absence of such marks would not have been conclusive in his favour. The parties chose to go to trial upon the issue whether the accretion was gradual or sudden, and did not raise the issue whether the formation was upon the old ascertainable land of the defendant. Their Lordships, therefore, did not feel themselves justified in going into any other question than the one upon which the parties staked their case (see particularly, pp. 164 and 166.)

The next case on the subject is *Nogender Chunder Ghose* v. *Mahomed Esof*, 10 B. L. R., 406. In this case the river was a

navigable tidal one and a *chur* formed in the middle of a river and a settlement was made by the Government in respect of it with defendant. Subsequently, by the recession of the river new land appeared which was really a deposit on the ancient site of plaintiff's land, though adhering to the *chur* belonging to the defendant under the settlement with Government. The new formation was adjudged by the Privy Council to belong to the plaintiff. The facts of this case are similar to those of the present. The fact that the river was a tidal navigable one does not make much difference. The *chur* when originally formed would no doubt have been at the disposal of the Government, as being formed in the bed of a tidal navigable river. As the doctrine of lateral accretion is applicable to tidal navigable rivers, the owner of the *chur* was in a position to acquire land by accretion. If, notwithstanding this position and notwithstanding the fact that the new formation adhered to his *chur*, he was held to have no right as against the owner of the site on which the suit formation took place, it must *a fortiori* be held in the principal case that the Government could not, by reason of the ownership of the Tatapudi *lanka*, claim the suit *lanka* as an accretion to the Tatapudi *lanka* and the suit *lanka* should have been adjudged to belong to the plaintiff as the owner of the site. It has been already pointed out that the real question in these cases is not whether the site was formerly above water and then submerged, but whether the site belongs to the plaintiff and can be ascertained. The ascertainment of the site offered no difficulty in the Madras case, for the plaintiff's estate bounding both sides of the river, she was entitled to the whole bed of the river between the limits of her estate. Speaking of the conflicting claims of the parties in *Nogender Chunder's Case*, their Lordships observed "It is not easy to see upon what principle a title to alluvion by gradual accretion should prevail against the original ownership established by identification of site, unless it be that where the accretion is so gradual as to be latent and imperceptible during its progress, the law on grounds of convenience presumes incontrovertibly that no other ownership can be shown to exist and so bars inquiry. In the present case, it appears to their Lordships that such a gradual and imperceptible accretion as the law contemplates is not proved and that there are peculiar reasons why the title of the plaintiffs should be preferred to that of the defendants. The latter do not claim the land as an accre-

tion to their original estate. They claim it as an accretion to *chur* cast up by the river and settled with them by the Government. Let it be granted that the first retrocession of the river was to leave bare this *chur* in the midst of the stream and that the land then cast up was beyond the confines of the plaintiff's estate, the river continues to recede, more land appears and new land *though adherent to that first discovered is really a deposit on the ancient site of the plaintiff's land. Why should the ownership of that which was thus regained be altered by the fact that by some accidental cause land joining the outer edge of it first emerged as an island?"* It may be argued on the other side with reference to the first sentence of the passage we have quoted that title by gradual and imperceptible accretion must prevail against ownership established by identification of the site. Such a construction, however, cannot be put upon the language of the Privy Council and would be inconsistent with the earlier decisions. In all the cases in which the contending parties set up title by accretion, the accretion alleged was, and must have been, gradual. For there could have been no possible doubt that a sudden accretion would not affect the existing ownership and the contrary proposition would have been unwarranted under any system of law. Again, in all these cases the party claiming by accretion claimed under Section 4 of the Bengal Regulation which refers to *gradual* accession. See the comment on this section by the Privy Council in 10 B. L. R., 429. Their Lordships emphatically lay it down in the clearest terms in *Lopez's Case* that the doctrine of lateral accretion is inapplicable except in the case of the sea or public rivers whose beds belong to the Crown. In the passage we have quoted from *Nogender Chunder's Case* there is no indication that their Lordships intended to go back upon any portion of their statement of the law in *Lopez's Case*. It may well be that in the case of public navigable rivers the beds of which are vested in the Crown, land belonging to a private owner on the bank of the river may by gradual encroachment be washed away and become part of the public domain and that if such land be as gradually restored by the recession of the river it may be the subject of a subsequent acquisition by lateral accretion and it may be that under these circumstances, title by original ownership of the site may not prevail against title by lateral accretion. But we do not think that their Lordships intend-

ed to make even this concession in favour of the doctrine. This was in fact the argument put forward by Mr. Pontifex, but it was expressly disallowed by their Lordships. See p. 431-432. Their Lordships refer to the argument of Mr. Pontifex and observe that the decisions of the Privy Council are direct authorities against Mr. Pontifex's proposition. Their Lordships accede to * "what is said in *Lopez* v. *Muddun Thakoor* to the effect that proprietor may in certain cases be taken to have abandoned his right in the diluviated soil. It is unnecessary to consider whether this might not be the result of a successful application for remission of revenue under Act IX of 1847. Sec. 5; for in the present case there is nothing from which an abandonment can be inferred."

The drift, therefore of the first passage we have quoted from *Nogender Chunder's Case,* appears to be this.

" The only possible contention which you can put forward in opposition to the title by original ownership of the site is title by gradual accretion. We do not agree in your contention. But even if your contention is sound, there is no evidence in support of it and there is thus no foundation for it in fact."

The doctrine that title by re-formation prevails against title by accretion was again affirmed in the case of *Sarat Sundari Debya* v. *Soorjyakant Achargi,* 25 W. R. 242.[1]

It will be clear from the foregoing authorities that the title to the *lanka* should have been decided according to the doctrine of vertical accretion as laid down in *Lopez's Case* and not by the doctrine of lateral accretion.

For the purpose of applying the doctrine of vertical accretion, it is absolutely immaterial, whether the accretion is slow or sudden.

* This is what their Lordships said in *Lopez's Case.* "Their Lordships, however, desire it to be understood that they do not hold that property absorbed by the sea or a river is under all circumstances and after any lapse of time to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again like any other derelict land into the public domain as part of the sea or river of the State and so liable to the written law as to accretion and annexation."

(1) See also *Mani Lal Sahoo* v. *Collector of Sarun,* B. L. R. Appx. 93, *Collector of Rajshahye* v. *Rani Shamasoondari Debea,* 14 B. L. R. 219, *Court of Wards* v. *Radha Pershad Singh,* 22. W. R. 238; *Buddunchunder Shaha* v. *Bepin Behari Roy,* 23 W. R. 110.

The slowness or suddenness of the accretion may be important in cases where a person gains by lateral accretion from the sea or a river the bed of which is vested in the State. The doctrine of of vertical accretion, however, depends upon the previous ownership of the bed or site and the owner of the site will be entitled to the vertical deposit thereupon, whether they are formed slowly or suddenly. The observation of the High Court that the suit *lanka* was not a sudden vertical accretion in the bed of the river was therefore irrelevant.

We shall now proceed to consider the question with reference to the English and other laws. The rule of English law as to accretion was laid down in the recent case of *Foster* v. *Wright* (1878), L. R. 4 C. P. D. 438. In that case the plaintiff was lord of a manor under grants giving him the right of fishery in all the waters of the manor and consequently in the river Lune running through it. The lands adjoining the river on both sides belonged to the lord. The river was at the point in question neither tidal nor navigable. The defendant's land did not originally abut upon the river but by gradual encroachment the river wore away the plaintiff's land on one bank and part of the defendant's land also, so that a part of the defendant's land became part of the river-bed. This part could still be identified and its boundary ascertained. The question was whether the plaintiff's exclusive right of fishing extended over so much of the water as flowed over land which was formerly part of the defenddaut's property. It was held by *Coleridge,* L. C. J., that the language of the grants as to the fishery conveyed a right to take fish irrespective of the ownership of the soil over which the water flowed. The *Chief Justice* was not satisfied that the soil of the river Lune as it varied gradually from time to time passed to the plaintiff irrespective of the *medium filum*. On the other hand, *Lindley, J.*, rested his decision not merely upon this ground but also upon the ground that the plaintiff was the owner of the river-bed. He held that just as gradual accretions of land from water belonged to the owner of the land gradually added to, land gradually encroached upon by the water ceased to belong to the former owner and that there was no difference in this respect between tidal and non-tidal, or navigable and non-navigable rivers. In the case before his Lordship the plaintiff was the owner of the old bed of the river and

day by day and week by week he became the owner of that which gradually and imperceptibly became its subsequent bed. His Lordship accordingly held that the title so gradually and imperceptibly acquired could not be defeated by proof that a portion of the bed then capable of identification was formerly land belonging to the defendant or his predecessors in title. It is somewhat difficult to understand this part of the decision of *Lindley,* J. Apparently, according to his Lordship, the lord was entitled to the whole of the soil covered by water of the river wherever the river might run. It is not easy to reconcile this position with the well-established proposition of English Law that the riparian proprietors are entitled to the bed of a non-tidal river *ad medium filum.* By the encroachment of the river the defendant became a riparian owner and should therefore have been entitled to half the bed of the river.* It is strange that while the the defendant could derive none of the advantages of a riparian owner, he should be considered liable to the disadvantage of losing a part of what was admittedly his land by the encroachment of the river. In so far however, as *Lindley,* J., held the doctrine of lateral accretion applicable to the banks of non-tidal rivers, his decision appears to be in accordance with the trend of American authority. The doctrine laid down by the Privy Council in *Lopez's Case* that re-formations upon ascertainable sites belonged to the original owner appears to be far more consonant with the principles of natural justice than the rule laid down by *Lindley,* J.

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* It cannot be said that a person who was not originally a riparian proprietor can never become one by any change in the course of the river. On this point we cannot do better than quote the following lucid and able exposition of the law from *Wells* v. *Bailey* (3 Amer. St. Rep. 48; S. C. 55 Connecticut 292). "They (the defendants) say, in the first place, that the law of accretion applies only to the case of riparian land, and that as the plaintiff's lot did not originally bound upon the river, but was conveyed to him by distinct lines and boundaries at least upon the sides affected by the present question, it cannot become by any changes of the river riparian land.

"We cannot accede to this claim. If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had

Even supposing that the doctrine of lateral accretion is applicable to non-tidal and non-navigable rivers, it can be applied only to formations accreting to the bank and not to insular formations in mid-stream. The doctrine that riparian proprietors are entitled to the soil of the bed *ad medium filum* is a well-established rule of English Law. By the doctrine of accretion and encroachment laid down by *Lindley, J.*, a person who was entitled to the bed as riparian owner may cease to be so entitled and a person who was not a riparian owner may become a riparian owner and entitled to the bed. Whoever may be the riparian owners, there can be no doubt that the riparian owners for the time being would, according

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been originally such. This follows necessarily from the ordinary application of the principle. All original lines submerged by the river have ceased to exist; the river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation, and is not affected in any manner by the relations of the river and the land at any former period. If after washing away the intervening lot it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that it had taken from the intervening lot the whole, by the law of accretion would belong to the remoter, but now proximate lot. Having become riparian it has all riparian rights. The general principle is recognized by all the text writers, and by numerous decisions of the English and American Courts. The river boundary is treated in all cases as the natural boundary and the rights of the parties as changing with the change of its bed.

"The defendants claim, in the next place, that though a riparian owner may take by accretion to the middle of a stream, or in the case of a navigable river to high-water mark, yet, that that being the limit of his original title, and in the case of a non-navigable river the line of the adjoining owner, he cannot take such accretions beyond that line. This claim is utterly without support. This dividing line between owners of the opposite sides of a non-navigable river is the middle of the river but the middle line is merely an imaginary one, and changes with every change in the bed of the stream. Thus in Gould on Waters, Section 159, it is said that 'If an unnavigable stream in which the title of the riparian owner extends *ad filum aquæ*, slowly and imperceptibly changes its course, the boundary line is the centre of the new channel.' And numerous cases are cited in support of the position."

to the law of England, be entitled to share the bed of a non-tidal stream. The ownership of any island formed in such stream cannot be determined by any principles of the law of lateral accretion, but can only be decided upon considerations based upon the proprietorship of the bed. Nor can it be said, that inapplicable, as the doctrine of lateral accretion may be, to an island newly formed in mid-stream, it may be applicable to an island formed in contact with one already in existence, for the right of the riparian proprietors to all that part of the bed of the stream which is not covered by the original island cannot be affected by the existence of the island. The right to islands formed in a stream must therefore be decided by the doctrine of vertical accretion which is based upon a recognition of the ownership of the site. The conclusion we have reached is consistent with the provisions of the Civil Law and is fully supported by the English and American text-books and decisions.

"If an island rises in a river and it lies in the middle of a stream, it belongs in common to the landowners on either bank in proportion to the extent of their riparian interests; but if it lies nearer to one bank than to the other, it belongs to the landowners on that bank only." *Justinian's Inst. II. 1. 22.*

The rule, however, is not here laid down correctly. The ownership of *insula nata* belonged exclusively to the owner or owners on one side, only when a line drawn down the centre of the river-bed would pass wholly to the right or left of it. If such a line cut it at all, the ownership was divided even though it was far from the exact middle. (See Professor Moyle's notes on the above section). The learned professor rightly observes in his note that an island formed in a river is acquired by *accessio* only when the *flumen* is *publicum*, and that if the stream is not *publicum*, its bed already belongs to the riparian owners. The same rule is given in Coulson and Forbes, p. 95.

"If an island is formed by natural causes, the property in it remains apportioned in the same manner, as was before its appearance the property in the soil on which it stands."

The rule of Civil Law has been adopted in the Code Napoleon.

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"Islands and accumulations of mud formed in rivers and streams not navigable and not admitting floats belong to the proprietors of the shore on that side where the island is formed. If the island be not formed on one side only, it belongs to the proprietors of the shores on the two sides divided by an imaginary line drawn through the middle of the river." Code Napoleon, Sec. 561.

The rules of Civil Law have been adopted in America also (1) : The Code of Louisiana (2) lays down definite rules upon the subject.

"If an island be formed in the middle of a stream it belongs to the riparian proprietors whose lands are situated opposite the island. If they wish to divide, it must be divided by a line supposed to be drawn along the middle of the river. The riparian proprietors then severally take the portion of the island which is opposite their land in proportion to the front they respectively have on the stream opposite the island. If, on the contrary, the island lies on one side of the line thus supposed to be drawn, it belongs to the riparian proprietors on the side on which the island is, and must be divided among them in proportion to the front they respectively have on the stream opposite the island."

These rules have been adopted by the American Courts generally and the principles upon which insular formations should be apportioned have been worked out in great detail in many of the American decisions.(3) In all these decisions and in all others bearing upon the subject, the American Courts treat the ownership of islands in rivers as determined by the ownership of the bed. For instance in *McCullough* v. *Wall*, the Court observes that islands in rivers fall under the same rule concerning ownership which apply to beds under water. The most recent case is that of *St. Louis* v. *Rutz* decided in 1890 by the Supreme Court of the United States. (138 United States Reports, 226). The Court observes on page 245 "It is laid down by all the authorities that if an island or dry land forms upon that part of the bed of the river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. He

(1) See Angell on Water-courses, 7th ed., S. 44.

(2) Civil Code of Louisiana, Arts. 505—7.

(3) *See Ingraham* v. *Wilkinson* (1826) in Amer. Dec. 342, S. C. 4, Pickering 263; *Deerfield* v. *Arms* (1835) 28 Amer. Dec. 276 S. C. 17 Pickering 41; *McCullough* v. *Wall* (1850) 53 Amer. Dec. 715, 719, S C. 4, Richardson's South Carolina Rep. 68.; *Trustees of Hopkin's Academy* v. *Dickinson*, 9 Cush, 548.

retains the title to the land previously owned by him with the new deposits thereon." The doctrine of accretion whether lateral or longitudinal is altogether incapable of application to an island. The rules framed by the Courts to regulate the ownership and appropriation of islands all proceed upon the assumption of its inapplicability. Islands are not formed in a day, but only gradually. If by a lucky accident the nucleus of an island happens first to be formed in the portion of the bed belonging to a riparian proprietor, and it subsequently extends itself across the median line, or up or down the river, this accident may lead to the destruction of the rights of ownership of the opposite, the upper, or the lower, riparian proprietors. The theory of nuclear islands and of lateral and longitudinal accretions thereto which found favour with the High Court will thus be seen to be utterly baseless and unjustifiable.(1)

ESCHEAT UNDER THE HINDU LAW.

The Hindu Law of Escheat is a subject for writing on which one need make no apology. Of the various departments of Hindu Law which the Courts in India have been called upon to administer, the Law of Escheat has received, perhaps, the smallest measure of judicial consideration. The only case where the question of escheat came up before the Indian Courts in any shape or form is that reported at *Collector of Masulipatam* v. *Cavaly Vencata*, 8 M. I. A., 500. In that case the Collector of Masulipatam representing the Crown claimed by escheat the estate of a Brahmin who died without heirs. The defendant contended against this claim that under the Hindu Law the estate of a Brahmin could, under no circumstances, escheat to the Crown so long as there was *any* Brahmin living, and in support of this contention relied upon the following text among others:—"The property of a Brahmin shall never be taken by a king." (Manu, ix. 189). The Privy Council, however, relied on the following passage of Narada: "If there be no heir to the wealth of a Brahmin, it must, on his death, be given to a Brahmin; otherwise the king is tainted with sin," (Narada xiii. 51) and held that, by necessary implication from this text, the property of a Brahmin dying

(1) *Sree Rajah Ooppalapaty Jogee Jagannadharauze* v. *Sub-Collector of Rajahmundry*, Mad. Sud. Dec. (1858), p. 189.

without heirs vests in the Crown, and that it was not necessary in the circumstances of the particular case before them to decide whether property so escheating to the Crown vested in it absolutely, or was subject in its hands to a trust in favor of Brahmins as a class. Thus in the only case where the Crown claimed an estate by escheat and where its right was questioned, the Courts found it unnecessary under the circumstances to grapple with the difficult questions bearing on the Law of Escheat and were content with brushing aside an argument raised against the Crown's right to take by escheat. The question of the right of the Crown to take by escheat is exactly where it was before the establishment of British judicial tribunals to determine questions of Hindu Law.

It is, indeed, easy to understand the broad proposition of law known almost to everybody that heirless property goes to the king. This doctrine is not peculiar to the Hindu system of jurisprudence and requires no true understanding of the genius of the Hindu Law to know it. But the real difficulty consists in recognizing the conditions under which a given property can be said to be "heirless." Is the list of possible heirs succeeding in a given order the same for all castes, or does it vary with the different castes? This is the question which we mean to discuss in this article.

It may here be objected that the text of Yajnavalkya: "The wife, the daughters, also the parents, brothers likewise, their sons, gentiles (*gotrajas*), cognates (*bandhus*), the pupil and the fellow-student; of these, the next in order in default of those previously mentioned takes the wealth of the sonless deceased. This law applies to all castes," (Yajnavalkya, Chap. II, 136), and the commentary thereon are conclusive authorities for the position, accepted and followed by a long and undisturbed course of judicial decisions, that this list enumerates the possible heirs or classes of heirs to the wealth of the sonless deceased, belong to what caste he may. Before, therefore, proceeding to discuss the main question it is only proper to see if we are precluded from considering the question with any practical utility, and if the doctrine of *stare decisis* does not apply to the question before us.

There have indeed been numerous cases where *sapindas* removed five or six degrees from the deceased in the Brahmin, Kshatriya, Vaisya, or Sudra caste have claimed the estate of the deceased as his reversioners and succeeded in obtaining the relief they

asked for, on the strength of *that title*. But it should be remembered that in none of these cases the defendant impeached the legal right of the plaintiff to succeed on proof of his *sapindaship*. The presiding judges, the legal practitioners and the parties concerned all tacitly assumed that the plaintiff was entitled to succeed on proof of the relationship alleged. The fact of the relationship was disputed or other defences were set up; but it has never apparently entered the head of the parties or their counsel that, granted the plaintiff was related to the deceased in the manner alleged, he could not *by reason of the caste to which he and the deceased belonged*, claim to be heir to the wealth of the deceased. The question which forms the subject of the present article was therefore *never* litigated in Courts, and the fact that judges, lawyers and parties *assumed* the law to be what it was not and did not, therefore, question it, does not and ought not, in our opinion, to preclude the discussion of the question when it is raised for the very first time in the annals of litigation. If an erroneous decision on a point of law has not force enough to preclude the parties to the suit in which such decision was passed from questioning the soundness of that decision in a subsequent proceeding, we need little logic to shew that a tacit assumption on a point of law, however strengthened by repeated acquiescence, cannot acquire such force as to preclude any person from questioning the correctness thereof for all time to come. Again, it is not desirable to apply the doctrine of *stare decisis* where the question is one of construction. The under-lying principles of the various departments of Hindu Law cannot be easily gathered by any straggling gleaner. From a voluminous and apparently confused and conflicting mass of textual authorities, the principles of the law have to be deduced by the careful application of exegetic rules to which the writers of the different codes of law owed allegiance. Texts of the different writers bearing on the same subject have to be patiently collected and collated, and they have next to be construed in a manner which explains away, if possible, any apparent inconsistencies and makes no text altogether superfluous or purposeless. Under such circumstances, errors of law when it is administered in most cases by judges who have no access to the originals and who depend upon faithless translations of stray texts must be numerous. It is, therefore, of the utmost importance that the doctrine of *stare decisis* should not be applied so as to perpetuate

errors of construction which must be more than occasional under the circumstances above set out.

Again, the great immobility of the Indian legislative machinery is another circumstance which makes it highly undesirable to apply the doctrine of *stare decisis* to the case before us. Where the legislative machinery of a country is highly active, as is the case in England, the evil consequences of applying the doctrine in the case of erroneous decisions are considerably short-lived, as the Legislature can at any short notice be moved to amend the existing law so as to give no room for the perpetuation of errors. But whereas in this country the machinery is dull and there is, therefore, little prospect of any legislation amending the existing law on which the erroneous decisions are based, the application of the doctrine must continue to cause mischief. There is even now little prospect of the codification of Hindu Law and of the erroneous decisions on questions of Hindu Law being corrected by legislation; and the only preventive against the perpetuation of errors here is to allow the judges absolute freedom from undue regard to precedents where they are manifestly traceable to a wrong interpretation or ignorance of the texts of ancient Hindu Law-books.

Nor can it be urged that it would cause considerable hardship to unearth a few old texts, to perceive the fallacy in the law as we have so long assumed it to be, and to accept a more correct construction of the texts. Nobody can be disappointed in his reasonable expectations by the proposed change in the constructions of the texts. If to-day the people are informed that a certain class of persons standing in a particular degree of relationship to the sonless deceased in the Brahmins, Kshatriya, Vaisya or Sudra caste are not in the line, of heirs, where is the hardship? Could they have done anything, or entered into any transaction on the faith of the law as hithertofore administered, and could their expectations regarding the consequences of such transactions be defeated by a change in the law? None has a right to expect that another to whom he stands in a particular degree of relationship would die issueless leaving his estate undisposed of and that he would succeed to it as heir, and if he entertain such expectations, they are certainly not reasonable. Even if they are, the disappointment cannot be an injury in the proper sense of

that term. The hardship, the consideration of which could justify the perpetuation of an error in the construction of the law, relates more to violent divesting of vested interests than to the deprivation of mere possibilities of succession.

Having thus briefly pointed out why the doctrine of *stare decisis* should not be applied to the present case, we now proceed to discuss the main question, whether the text of Yajnavalkya furnishes a list of heirs or classes of heirs applicable in its entirety to all castes. Yajnavalkya after defining the various sorts of sons and discussing their relative importance lays down the order of succession to the wealth of a sonless deceased Hindu in the following text: "The wife, the daughters also, parents, brothers likewise, their sons, gentiles (*gotrajas*), cognates (*bandhus*), the pupil and the fellow-student, of these, the next in order, in default of all the preceding, takes the wealth of one who has departed for heaven without leaving male issue (*putra*). This law applies *to all castes*" (Yajnavalkya, Ch. II, 135, 136). Does this text lay down two propositions,—(1) that the wife, daughters, &c., are among the heirs of every deceased sonless Hindu, and (2) that they succeed in the order specified herein, or does the text simply lay down the order of succession, leaving the question of the heirship of persons and classes of persons therein named to be determined *aliunde*? We shall presently show the latter of the alternatives is the correct one.

The gloss of the Mitakshara too upon this text of Yajnavalkya does not enlighten us materially on the question about which we feel some real difficulty. The opening words of Vijnanesvara's commentary on this text are: "That sons, principal and secondary, take the heritage has been shewn. The order of succession among all (tribes and classes) on failure of them is next declared . . . . "He who has no son of any among the twelve descriptions above stated is one having 'no male issue.' Of a man thus leaving no progeny and going to heaven or departing for another world, the heir or successor is that person among such as have been enumerated, *i.e.*, the wife and the rest, who is next in order on failure of the first-mentioned respectively. Such is the construction of the sentence. This rule or order of succession in the taking of an inheritance must be understood as extending to all tribes, whether the *murdhavasiktha* and others in the direct series of

the classes or *suta* and the rest in the inverse order and as comprehending the several classes the sacerdotal and the rest." (Cole. Mit, Chap. II, Sec. 1, 1—4). On the real question at issue this gloss does not make one a bit the wiser; but this gloss serves one purpose, *viz.*, that the term *all* in '*all castes*' is used rather to include the *anuloma* and *pratiloma* classes (not included in the general acceptation of the word in the Sanskrit original *varna*) than to bar the exclusion of any of the four well-known castes denoted by the term *varna*.

There is thus nothing in the text of Yajnavalkya or Vijnanesvara's commentary thereon to shew that the long list of possible heirs applies in its *entirety* to every one of the four castes—Brahmin, &c. We now proceed to shew that the list cannot possibly apply in its entirety to every one of the four castes.

Now the last three heirs mentioned in the list are the *áchárya* the pupil and the fellow-student. Yajnavalkya defines an *áchárya* thus:—"He who invests (another) with the sacred cord and teaches him the Vedas." (Yajnavalkya, Chap. I, 34). Manu defines an *àchàrya* thus: "They call that Brahmin who initiates a pupil and teaches the Veda together with Kalpa and Rahasya the *áchárya* (of the latter)." (S. B. E. series, Manu, Chap. II, 140). The definition of a pupil follows from that of the *áchárya*. As for the fellow-student, Vijnanesvara about the close of his commentary on the above text defines him as "he who received his investiture, the Veda and knowledge of its meaning from the same preceptor." (Cole., Mit. Ch. II, S. 7-2). Is it possible for a Brahmin, a Kshatriya, a Vaisya and a Sudra to succeed to the wealth of another as his *áchárya* as his pupil and as his fellow student? The occupations permitted to men of the different castes are thus enumerated in Manu: "To Brahmins, he assignedt eaching and studying the Veda, sacrificing for their own benefit and for others, giving and accepting of alms. The Kshatriya, he commanded to protect the people, to bestow gifts, to offer sacrifices, to study the Veda and to abstain from attaching himself to sensual pleasures; the Vaisya to tend cattle, to bestow gifts, to offer sacrifices, to study the Veda, to trade, and to cultivate land. One occupation only the Lord prescribed to the Sudra to serve meekly even these three castes." (Manu. I. 88—91). It is needless to quote other authorities to the same effect. This makes it

abundantly clear that the Brahmin alone is eligible as an *áchárya*. It is, therefore, the Brahmin alone that can succeed as *áchárya* and not one of any other caste. The Brahmin can evidently succeed as pupil and as a fellow-student. The Kshatriya and the Vaisya can succeed as pupil and as fellow-student-but not as an *áchárya*. The Sudra cannot succeed as an *áchárya*, because he is not authorized to teach the Veda, nor could he succeed as a pupil, because he could not study the Veda, also because he is not a twice-born and is not entitled to be initiated. As he cannot be a pupil, it follows he cannot succeed as a fellow-student either. Thus it is beyond all doubt clear that while Brahmins can succeed as *ácháryas*, as pupils and as fellow-students, the Kshatriya and the Vaisya can succeed only as pupils and as fellow-students, and the Sudras cannot succeed as *ácháryas* or as pupils or as fellow-students. As the list of heirs mentioned in Yajnavalkya's text does not apply in its entirety to every one of the four castes, we must ascertain the varying lists of possible heirs to the estate of the sonless deceased belonging to the different castes.

In the case of the Brahmin, he can possibly take as an heir of any of the descriptions given in the list.

In the case of the Kshatriya and the Vaisya (for they may be classed together for the purposes of the article) we find some difficulty when we consider if they can succeed as *gotrajas* or *bandhus* of the sonless deceased. In regard to [adoption of a son, Saunaka having laid down the rule in the case of Brahmins adds "Of Kshatriyas in their own class positively and (in default of a *sapinda* kinsman) even in the general family following the same primitive spiritual guide (*guru*)" (Dat. Mim., Sec. II, 74). Commenting upon the clause "even in the family following the same primitive spiritual guide", the Dattaka Mimámsá says, "Since there are no distinct and peculiar general families of the primeval Kshatriyas, the primitive spiritual guide is mentioned to particularise the class from which the adoption is to be made" (*Ibid* 76.) The Dattaka Mimámsá makes the same observations in respect of the Vaisyas. A text from the Vedas is also quoted to show that though the Kshatriyas and Vaisyas have no *gotra* of their own, they are for all purpose of sacraments and sacrifices considered to belong to the *gotras* of their *gurus*. Thus it can fairly be argued that for

purposes of inheritance also, the Kshatriya and the Vaisya should be considered to belong to the *gotras* of their different *gurus*. And as '*bandhus*' according to Vijnanesvara denotes '*sapinda* relations of a different *gotra* from that of the sonless deceased' it follows that the Kshatriya and the Vaisya could succeed as a *gotraja* and as a *bandhu*. Though a Kshatriya could not succeed as an *áchárya*, a Brahmin can succeed as an *áchárya* to the wealth of a sonless deceased belonging either to the Kshatriya or to the Vaisya class. Therefore, the long list of heirs exclusive of the pupil can possibly apply in the case of the estate of a deceased sonless Hindu belonging either to the Kshatriya or to the Vaisya caste.

As regards a Sudra, we have proved that he cannot succeed to such an estate as an *áchárya*, or a pupil, or a fellow-student. It, therefore, obviously follows that none of any other caste can succeed to the estate of a deceased sonless Sudra as an *áchárya*, or a pupil, or a fellow-student. Nor could a Sudra succeed as a *gotraja* or a *bandhu*; nor could any of the other castes succeed to his estate as a *gotraja* or a *bandhu*. Saunaka regarding an adoption by a Sudra says that he must adopt 'from amongst those of the Sudra caste.' The absence of any other restrictions, such as are laid down in the case of adoptions by persons of other castes, is a clear indication that the Sudras have no *gotra*. Again, Manu says, "A damsel who is neither a *sapinda* on the mother's side nor belongs to the same *gotra* as the father's is recommended *to twice-born men* for wedlock and conjugal union." (Manu, Ch. III, 5). Similar passages to the same effect may be quoted from other Smriti-writers, but it is hardly necessary. The *gotra* regarding restrictions in the choice of a wife do not by clear implication bind the Sudras, the same having been formulated only with respect to the twice-born. If the words '*gotraja*' and '*bandhu*' in the text of Yajnavalkya were intended mainly to denote the existence of mere *sapinda* relationship irrespective of the question of *gotra*, all those can succeed who stand within the limits of this relationship. But the commentary of Vijnanesvara says: 'On failure of the paternal grandmother, the *sapindas* sprung from the same general family with the deceased, *viz.*, the paternal grandfather and the rest inherit the estate; for *sapindas* sprung from a different family are indicated by the term *bandhu*." (Mitákshará Chap. II, Sec. V.

3 Stokes's H. L. B., p. 446.) It is thus clear that to succeed as a *gotraja* the heir should belong to the same *gotra* with the deceased, and to succeed as a *bandhu* he must belong to a different *gotra* from that of the *deceased.* The Sudra having no *gotra* cannot succeed as either, for otherwise he will be entitled to succeed indiscriminately as either—a position which cannot be seriously maintained.

Some contend that the word *gotra* denotes simply the descent from a common ancestor through an unbroken line of males and that, therefore, the Sudras can succeed as *gotrajas* as well as persons of other castes. But it should be remembered that the primary acceptation of the word *gotra* is descent from a common Rishi through an unbroken line of males, and that a word should not be understood in its secondary sense unless the context proves the absurdity of giving the word its primary meaning. That the word *gotra* cannot have the meaning contended for is also clear from the Vedic text which says that as the Kshatriyas and the Vaisyas have no *gotras* of their own, they must be regarded as belonging to the different *gotras* of their *purohits.* If *gotra* means descent from an ancestor through an unbroken line of males surely the Kshatriyas have *gotras* as well as Brahmins and the Vedic text will be inexplicable.

We are bound in passing to refer to a note made by Whitley Stokes at p. 564 of his edition of Hindu Law Books to the effect that the Sudras are all supposed to belong to the *gotra* of Kasyapa. Whitley Stokes quotes no authority for this supposition; nor have we come across any. But were the supposition well-founded, it would follow that any Sudra can lay claim to the estate of any other Sudra as his *gotraja,* and what is equally reasonable, can succeed to the estate of a sonless deceased Hindu of any other caste belonging to the Kasyapa *gotra* as his *gotraja.* It would also follow that the estate of a Sudra cannot escheat to the king for want of heirs so long as there is any Sudra living—a privilege apparently denied even in the case of Brahmins who are supposed to be highly favoured by the Codes of Law.

These are the conclusions at which one would arrive by strictly following the process of logical reasoning deduced from the pronouncements of the Smriti-writers on the occupations permitted to

the different castes and on the restrictions laid down in respect of adoption and marriage. We shall now proceed to discuss texts which bear directly on the question of escheat and necessarily disprove the theory that property escheats to the king in *all* cases in the absence of *all* heirs enumerated in Yajnavalkya's text.

Brihaspati after stating "In default of the daughter and her son, uterine brothers or brother's sons, agnates (*sakulyas*), and cognates (*bandhus*), pupils or learned Brahmins are entitled to the inheritance." (Brihaspati, Ch. XXV, 59) says: "Should a Kshatriya, Vaisya or Sudra die without leaving male issue or wife or brother, their property shall be taken as escheat by the king; for he is the lord of all" (Brihaspati Ch. XXV, 67). According to a well-known rule of interpretation formulated in the Mimáṁsá the rule embodied in the former passage applies only to cases not covered by the rule stated in the latter. The former rule, therefore, applies to the case of the estate of a Brahmin alone. This text of Brihaspati is quoted at p. 572, Vol. II, Colebrooke's Digest as sloka, CCCCXLVI, in para. 49, Sec. 1, Chap. XI, Dayabhaga (Stokes's H. L. B.), Mandlik's translation of Vyavahara Mayukha, page 83, and Vivada Chintamani, page 298. Sangrahakara (author of the well-known Digest of the Codes of Law) says: "If the father be not alive, the wealth goes to the issue of his father. If there be none as such, it goes to the issue of the great-grandfather. In this manner alone do the remoter *sapindas* take the wealth. In default of them, the *sakulyas*; the preceptor or the pupil, the fellow-student or virtuous Brahmins, the next in order in default of the preceding. In the case of Sudras, the king shall take their wealth in default of the brother of the full blood; and, similarly, even in the case of Kshatriyas and Vaisyas in default of the *áchárya* (preceptor). (Dr. Burnell's Dayavibhaga, page 30). This Digest is regarded as a book of authority and is quoted as such by Nilakantha in his Vyavahara Mayukha, Colebrooke's Digest and Stokes's Hindu Law Books. These two texts are clear authorities for holding that the list of possible heirs given in Yajnavalkya's text does not apply in its entirety to every one of the castes, and that it is merely intended to lay down the order of succession, the heirship of claimants being otherwise ascertained. The king, therefore, takes by escheat the estate of a sonless deceased Brahmin in default of all heirs down to the fellow-student and the estate of a Kshatriya, Vaisya and Sudra

in default of heirs mentioned in Sangrahakara's text just above quoted.

Whether a valid custom has now grown up under which a Sudra can claim the estate of a deceased Sudra as any one of the heirs mentioned in Yajnavalkya's text, has not been discussed in this article for want of space.

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Suryanarayana Pandarathar v. Gurunada Pillai, I. L. R., 21 M. 257. There had been a number of conflicting decisions as to the period of limitation provided by the Act in cases where an application for execution becomes infructuous by reason of claims being allowed or other cause. Whether execution is stayed by injunction or the fresh suit the result of which entitles a party to fresh execution is determined more than three years after the previous application, a new application is regarded sometimes as reviving the old one and, therefore, in time, or as barred by time. No very satisfactory rule could be laid down where the Act is silent. The Legislature ought to step in and make a provision for the deduction of time during which any injunction or suit, as above referred to, is pending. Compare *Sasivarna Tevar* v. *Arulanandham Pillai*, I. L. R., 21 M. 261.

Venkatasubramaniam Chetti v. Thayarammah, I. L. R., 21 M. 263. Yet another step has been taken in adding to the list of female *bandhus*. We cannot describe this as really extending the principle, for once you do not confine yourself to cases of special mention in a text and base *bandhuship* upon *bhinna gotra sapindaship*, it follows that the brother's daughter is as much a *bandhu* as the sister or the father's sister or the son's daughter. But we cannot, of course, understand the proposition of the *Chief Justice* and Mr. Justice *Davies* that a daughter's daughter is a *bandhu* because a son's daughter is a *bandhu*. It might seem to be common sense to a person unacquainted with Hindu Law. For it is based on what you call parity of reasoning. The son's daughter is born in the *gotra*, the daughter's daughter is not. Mr. Justice *Muthuswami Aiyar* declined to treat the sister's daughter as a *bandhu* in *Subba Ayyar* v. *Ganesa Ayya* I. L. R., 18 M. 183, a case that will stand upon the same footing as that of the daughter's daughter.

Kasturi Chetti v. Deputy Collector of Bellary, I. L. R., 21 M. 269. Section 582-A has created a great amount of mischief, as we anticipated, at the time it was passed into law. A section which was brought in

to counteract the evil effect of the extremely rigid interpretation placed by the Allahabad High Court upon the Court Fees' Act has been the source of much injustice in provinces where the Allahabad rule had not found favor. A learned Judge seems to have remarked that the Court Fees' Act is the ruin of many a cause in this country. While there is great truth in this observation it would be even more correct of section 582-A. So far as the law of limitation is concerned, it had nothing to do with the sufficiency or otherwise of the stamp on the appeal memorandum. The time was computed up to the date of presentation, But when section 582-A provides that time runs up to the date of the payment of the deficient duty unless the deficiency of the duty was due to mistake, every appeal presented with an insufficient stamp (and it is impossible for any fairly qualified practitioner to determine the stamp so as to satisfy the taxing officer in 50 *per cent.* of the cases) is liable to be dismissed. Judges have not shown themselves very liberal in their treatment of such cases. We noticed sometime ago in the *Calcutta Weekly Notes* a case where a revision petition heard many months after it was presented was allowed to be changed into an appeal upon payment of the proper stamp and allowed. Such a thing we feel to be impossible in Madras. In the case under notice the Judges were certainly more lenient than *Shephard* and *Boddam*, JJ. in Appeal 90 of 1897, where it was said that the deficiency was not due to mistake, because the vakil believed and persisted in arguing there was no deficiency.

Jagapathy Mudaliar *v.* Ekambra Mudaliar, I. L. R., 21 M. 274. The decision in this case is important as laying down the rule that it is not competent to a pleader to enter into a compromise for his client without his previous authority. It may be a salutary rule, but we cannot see whether in this matter any distinction should be made between one class of professional men and another. It will be open to the Legislature to make such a distinction. It will be the duty of the Courts to lay down an uniform rule whether the practitioner is a barrister or vakil or attorney or pleader. They can all plead and act in the Moffusil Courts; and if express authority is needed in the case of one class, it should also be in the case of the rest. If the circumstances of this country are any justification for a departure from the English rule, there will be no reason for any distinction as regards special authority between one professional body and another.

SUMMARY OF RECENT CASES.

Mortgagor and mortgagee —Fetter on Equity of Redemption—Collateral advantage.

Hoddinott v. Biggs [1808, II, Ch., 307, C. A.]

It is generally supposed that the case *of Jennings* v. *Ward* (2 Vern., page 520), has laid down a rule to the effect that as between mortgagor and mortgagee, there cannot be any other transaction entered into at the time of the mortgage, which can possibly benefit the mortgagee, and that any such transaction to be valid must be either before or after the mortgage and be independent of it. The Court of Appeal, after a careful consideration of that case and the other cases following it, has laid down that the proposition, as above stated, is too wide and has added certain qualifications to it, so as to make it good law and good sense. The proposition is qualified by the Court of Appeal may be thus stated. The mortgagee, may enter into any collateral agreement beneficial to him with the mortgagor at the time of the mortgage, and such agreement will be upheld provided it does not impose a direct clog on the right to redeem and is otherwise not an unconscionable bargain.

The Plaintiff had a mortgage of a hotel belonging to the defendants. The mortgage-deed contained a covenant by the defendant that during the continuance of the security he would deal exclusively with the mortgagee for beer and malt liquor sold on the mortgaged premises. The deed further contained a covenant that the security and the loan were to continue for five years. The mortgagor having ceased to purchase beer of the mortgagee, the latter sued for an injunction to restrain the breach of the covenant; on the other hand, the mortgagor claimed to redeem before the expiration of the five years. *Romer*, J., who originally heard the case, decreed for the plaintiff and held that both the covenants were valid. The decision of *Romer*, J., with regard to the injunction alone was appealed against, and the Court of Appeal confirmed the decision of *Romer*, J., and upheld the covenant of mortgage for the purchase of beer during the continuance of the case on the ground that it was one which did not in any way affect the right to redeem and was fair and reasonable and did not give the mortgagee any undue advantage.

Equitable mortgages by deposit of title-deeds—Notice—Priority.

Hopkins v. Hemsworth [1898, II, Ch.—347,] *per Kekewich, J.*

The legal mortgagee of certain land created a sub-mortgage on it to the plaintiff by depositing with him his title-deeds. Subsquently, however, the legal mortgagee, obtained possession by fraudulent means of the

deeds so deposited and created a second equitable sub-mortgage in favor of the defendant to whom the title-deeds were handed over. The defendant had no notice of the equitable mortgage in favour of the plaintiff and immediately after his own mortgage was executed, he gave notice of it to the mortgagor. The plaintiff brought an action against the defendant and the representative of the legal mortgagee for the declaration that he was entitled to a first charge for his money on the legal mortgage in preference to the defendant Hemsworth.

Kekewich, J., held that both the mortgages by deposit of title-deeds created equitable estates in land in the respective mortgagees and were not mere choses in action, and as the plaintiff was not guilty of any negligence or improper conduct in parting with the title-deeds, he was entitled to priority as his mortgage was prior in date, and that the defendant did not acquire any *preferential right by his notice to the mortgagor.*

Gaming contracts—Recovery of "money desposted to abide the event." Gaming Act, 1845 (8 and 9 Vict. C. 109) S. 18.

In re-Cronmire ex-parte Waud. Section 18 of the Gaming Act of 1845, precludes the recovery of sums "which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." A long course of decisions on this section has settled that "it was meant to apply only to the non-recovery by the winner of a sum deposited by the other party to abide the event and not to the right of the depositor to recover back his deposit if demanded before the money was paid over." In the present case one Waud had entered into certain contracts with Cronmire, a stock-broker, which purported to be sales and purchases of shares and stocks and resulted in a balance in favor of Waud to the sum of £375. These contracts were void as being gaming contracts. After the adjustment of accounts it was agreed that Cronmire was to sell certain stock to Waud in reality in payment of the balance due to him. The stock was not delivered and Waud sued the representatives of Cronmire for damages for non-delivery of the stock. Waud had also deposited money with Cronmire as cover to secure him against any loss that might accrue on the gaming transaction, but which, however, had resulted in a balance in favor of Waud. On the first part of the claim the Court of Appeal held, reversing the judgment of *Wright*, J., that as the balance in favor of Waud resulted from gaming transaction, it could not have been recovered from Cronmire and that, consequently, the contract to deliver the stock had no consideration for it and was void. On the second part of the claim they held, affirming the decision of *Wright*, J., that the deposit can be recovered on the ground that it

was never used or wanted to be used for the purpose for which it was deposited.

Breach of Statutory duty, action for—Master and Servant—Common employment.

Groves *v.* Wimborne (Lord) [1898, II Q. B. D., 402 C. A.]

The plaintiff was a boy employed by the defendant at the Dowlais Iron Works, of which he was the proprietor. Amongst the machinery in the works there were some dangerous portions which had been left unfenced. While the plaintiff was employed in his duties, his right arm was caught by some cog-wheels forming part of the dangerous portion of the machinery; and he was very seriously injured. The Factory and Workshop Act of 1878, S. 5, imposed a duty on the proprietors of factories to provide proper fencing to all the dangerous parts of the machinery. The plaintiff sued the defendant for damages for the injury. The Court of Appeal reversing the judgment of *Grantham*, J., held that the plaintiff was entitled to judgment.

The defendant raised two pleas to the plaintiff's claim. One of them was that the statute itself provided for a fine to be imposed upon the employer not exceeding £100, and that the plaintiff's only remedy was to proceed before a court of summary jurisdiction for that fine. The other objection was that of "*Volenti non fit injuria*". Their Lordships held that the first objection did not hold good, and upon a consideration of the whole purview of the Act, they arrived at the conclusion, that the fine provided for in the Act was not the only remedy open to the plaintiff. There are some Acts of the Legistature which impose an absolute unqualified duty on individuals, enjoining a particular course of conduct imperative, and provide for a penalty in case of deviation in the general interest of the public at large, but do not intend that an indivudual shall have a private right of action for the injury occasioned to him by breach of its provisions. There are certain other Acts which create a new duty in the interests of a particular class of people, and having provided for a remedy intend that that shall be the only remedy available. Their Lordships held that the present case did not fall under either of the two kinds of Acts. They held that the duty imposed was an absolute unqualified duty in favor of a particular class of persons alone, but that the fine provided for in the Act was not intended to be the only remedy available for the injured person. The second plea raised by the defendant was to the effect that he had discharged the duty imposed upon him by the Statute because he

had originally provided proper fencing for the machinery, but that it had been subsequently removed by some person and that the removal had not been brought to his notice, that the removal of the fence and the fact that it was not replaced must be taken to have occurred through the negligence of some fellow-servant of the plaintiff and that, consequently, the defendant was not liable. Their Lordships overruled this plea also. Where a servant is doing some business on behalf of his master and in the doing of that business, the servant is guilty of negligence which is the proximate cause of injury to a third person, the master is liable for that injury and he cannot plead that the injury was not occasioned by his fault but by the fault of his servant. It is not necessary for us to go into the various reasons which have been given by various Judges in support of this proposition. Suffice it to say that the rule is too well established to be doubted at the present day. The case of *Priestly* v. *Fowler* [3 M. & W., 1.] has established an exception to this rule, which also is well settled law, to the effect that where a number of servants are employed in the doing of the same business of their master, the master is not responsible for any injury caused to one of such servants by the negligence of his fellow-servant; because he is assumed to have made a bargain with the master that he will not look to him for compensation in respect of such injury. The business in which the servant goes to be employed has certain risks and the servant takes up the employment with his eyes open to these risks. It has to be remembered that this doctrine of "*Volenti non fit injuria*" can be pleaded as an exception to the liability of the master, where that liability is based upon negligence of the servant. But where the master is sought to be made liable not on the ground of negligence, but for breach of an absolute duty either in Common Law or created by a Statute or for violation of an absolute right in Common Law, the exception has no application whatever. In such cases the master cannot escape the liability by pleading that the injury was caused by the neligence of an independent contractor or of some fellow-servant. It was on this ground that their Lordships overruled the second plea of the defendant.

The cases of *Dalton* v. *Argus* [6 App. C. 740] and *Hughes* v. *Percival* [L. R. 3 H. L. 330] establish that where an absolute right such as a right of support is infringed, it is not necessary on the part of the plaintiff to prove negligence, but that the right is violated at the peril of the person infringing it.

Breach of absolute duty—Negligence—Landlord and tenant.

Blake *v.* **Woolf** [1898, 2 Q. B. D., 426, per Wright, J.]

The defendant was the owner of certain premises on the fourth floor of which he had a cistern filled with water for supplying his tenant with water. After the water had thus been laid on, the plaintiff became a tenant of the ground floor of the premises and received his water-supply from the defendant's cistern. On a certain day, it was discovered that there was a leakage in the cistern and the defendant on being informed of this instructed a competent plumber to put the cistern to right. The plumber was negligent in doing so, and water escaped from the cistern and damaged plaintiff's goods which were in the portion of the premises occupied by him. The plaintiff thereupon sued the defendant for damage. *Wright*, J. dismissed the plaintiff's suit on the ground that the damage was caused by the negligence of the plumber and not of the defendant.

The case of *Rylands* v. *Fletcher* has no doubt laid down a general rule that an owner or occupier of land is under an absolute duty not to bring on to his premises dangerous things, such as large quantities of water and that if he do so, he does it at his peril. This general rule is subject to some exceptions, and the present case falls under two of these exceptions. One of them is, where a person uses his land in the ordinary way in which it is generally used and damage happens to adjoining property without any negligence on his part, no liability attaches to him. The storing of water in the cistern in the present case was held by his Lordship to be an ordinary and reasonable use of the premises. The second exception is that, if the person who complains of the injury has consented to the dangerous matter being on the defendant's premises, the plaintiff cannot recover. His Lordship held that the plaintiff by taking up the premises with the water on, and accepting his supply of water from the cistern, had brought his case within the second exception also. There being thus no breach of an absolute duty or violation of an absolute right, the plaintiff cannot succeed except by showing negligence on the part of the defendant. And as the defendant had discharged his (relative) duty, by engaging a competent plumber to do the work, he was not responsible for damages caused to the plaintiff by the negligence of that plumber, inasmuch as he was an independent contractor and not a servant of the defendant in the doing of the work entrusted to him.

Hindu Law as to adoption by widow of predeceased son or by mother-in-law where son dies after father leaving no issue—Adoption under Hindu Law by widow of full owner, qualifications to the rule of—Adoption by person in whom an estate does not vest, not valid without consent of those in whom it has vested—Exceptions to the rule as to adoption by widow of full owner.

Payapa Akkapa Patel v. Appanna bin Bhimappa.

As a general rule of strict Hindu Law as settled by judicial decisions it is only the widow of the last full owner, who has a right to take a son in adoption to such owner, and that a person in whom the estate does not vest cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights. Four qualifications have however been recognised to this rule. The first is in the case of co-widows where on the death of the husband without male issue the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows of their vested rights, the estate of the deceased vesting on his death in all his widows. The second qualification has been recognised in the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case the right of the widow to take a son in adoption to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner, the principle of the recognition being that the act of adoption is derogatory of no other rights than those of the adopting mother. The third qualification is to the effect that when the adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent, the consent of kinsmen being in such cases limited to those who are by their union interested in the family property. When such consent is proved to have been given by the party in whom the estate vested, the adoption is upheld, though it has the effect of divesting the party giving such consent of his rights. The fourth qualification is allied to the third and is based on the principle of ratification by conduct or acquiescence :—*Printed Judgments of the B. H. C. for* 1898 p. 244.

San-Mortgage assignment—Conveyance for a term of years—Covenant to repay debt or balance due, makes a document not a conveyance but a mortgage only —Mortgage—Document, construction of—Construction of document, whether mortgage or conveyance.

Amratlal Ramdas v. Bavaji Monji.

Held by Ranade J.—The name given to a document does not necessarily determine its character. An instrument, which is ostensibly

a sale, may be intended to operate as a mortgage and not as a sale. It is the intention of the parties, so far as it can be gathered from the provisions and covenants contained in the instrument or from their subsequent conduct, which determines its real character. When it is a question whether a document is a conveyance for a term of years of the property to which it relates or is a *san*-mortgage assignment, the document is not a conveyance if it contains a covenant to repay the debt or to pay the balance that may be due :—*Printed Judgments of the B. H. C. for* 1898, p. 239.

Bai Jasoda *v.* Bamanshah Mancherji.

The High Court in its extraordinary jurisdiction would interfere to assist a party under the provisions of S. 25 of the Provincial Small Cause Courts' Act in cases where there is a substantial failure of justice and the decree of the lower Court is not according to law.

Per Fulton J.—A decree founded on a judgment not containing the decision on the points required by S. 203 of the Civil Procedure Code is not according to law. Where an error under S. 203 brings a case within the jurisdiction of the High Court, and the case is thus before it, it is entitled on feeling convinced that a failure of justice has occurred to pass an order which will rectify the mistake :—*Printed Judgments of the B. H. C. for* 1898, p. 251.

Limitation Act (XV of 1877), Article 134, Schedule II—Mortgage by plaintiff—Subsequent mortgage by mortgagees—Subsequent mortgage when binding on plaintiff to be redeemed independently of original mortgage—Equities between original mortgagors and his mortgagee—Equitable adjustment, mortgagor's right to.

Bhaskar Vishnu Phadke, *v.* Sakharam Narayan Pethe.

The suit was brought by plaintiff against eight defendants to redeem a mortgage passed in 1853 by the uncle of plaintiff to defendants 1 to 5, while defendants 6 to 8 were sued as holding mortgages passed to them in 1865 by defendants 1 to 5 who represented themselves as owners. It was found that Rs. 205 were due to defendants 1 to 5 on their mortgage and that Rs. 348-6-10 were due to defendant 6 upon his mortgage passed by defendants 1 to 5.

Held that the plaintiff was, on payment of Rs. 205 to defendants 1 to 5, entitled to redeem the lands mortgaged to them except the portion

of the lands mortgaged by them to defendant 6, that the mortgage to defendant 6 was valid and binding on the plaintiff under the ruling in *Maluji* v. *Fakirchand* (I. L. R., 22 B., 225), it having been passed more than 12 years before suit, and that the plaintiff was entitled to redeem that mortgage also on payment of Rs. 348-6-10 to defendant 6.

It having been contended on behalf of plaintiff-respondent that it is the defendants 1 to 5 who should be ordered to pay Rs. 348-6-10 as they had improperly mortgaged the plaintiff's property and should therefore account to him for the profits they had obtained—and in no case could the plaintiff be ordered to pay more than Rs. 205, the amount due on the original mortgage.

Held by Parsons, J:—

(1). In the ordinary case of a sub-mortgage, when all the parties are before the Court, the Court could and would order an account to be taken and settle the amount payable to the mortgagee and sub-mortgagee respectively, and the mortgagor would not be liable for more than the amount found due on the original mortgage.

(2). The mortgage held by defendant 6 was not a sub-mortgage or derivative mortgage, but by prescription has acquired a force and validity of its own and stand precisely on the same footing as if it had been passed by the plaintiff himself to that defendant. It must, therefore, be redeemed independently of the original mortgage and the sum due under it must be determined by an account taken under it alone. The amount to be paid for redemption was, therefore, not limited to the amount due under the original mortgage, but would be the amount found due on both the mortgages and would have to be paid separately to each of the mortgagees unless an account could be taken as between the mortgagees. Whether this could be done in the redemption suit so that the original mortgagee could be held liable in it to the plaintiff for the amount found due on the mortgage imposed by him on plaintiff's property was a question that could not be determined in this case, because the original mortgagees, defendants 1 to 5, are not parties to the appeal.

Held by Ranade, J:—

The plaintiff-respondent was bound to pay off the debts charged on the portion of the property by the mortgagees, but the amount so paid was really a payment made by him on behalf of the mortgagees and the plaintiff was entitled to claim an equitable adjustment by setting-off the smaller sum due by him to the mortgagees against the larger debt to be paid by him on mortgagees' account. The mortgagor's strict legal

liability is confined to his own mortgage. Any payment he has to make in excess to the sub-mortgagee is a payment on account of the mortgagee. The equitable adjustment would have been made in this case if the mortgagees, defendants 1 to 5, had been parties to this appeal:—*Printed Judgments of the B. H. C. for* 1898, p. 258.

Court of Small Causes, meaning of—Courts invested with jurisdiction of Courts of Small Causes—Civil Procedure Code, Act XIV of 1882, *Ss.* 5 *and* 25, *last clause—Bombay Civil Courts Act XIV of* 1869, *S.* 28—*Provincial Small Cause Courts Act IX of* 1887, *Ss.* 32, 35—*Act XI of* 1865.

Ramchandra Krishna Rajwade *v.* Ganesh Bapuji Dhavale.

A Court invested with the jurisdiction of a Court of Small Causes is not a Court of Small Causes within the meaning of S. 25, last clause, of the Civil Procedure Code. The expression "Courts of Small Causes" in the section means Courts properly and strictly so called, and does not include Courts only invested with the jurisdiction of Courts of Small Causes:—*Printed Judgments of the B. H. C. for* 1898, p. 266.

Hindu Law—Widow's right of maintenance—Widow's maintenance charged on property left by testator—Limited power of sale or mortgage conferred upon executrix—Sale in fraud of widow's right—Purchaser aware of fraud—Transfer of Property Act (IV of 1882), *S.* 39—*Probate and administration Act (V of* 1881, *amended by Act VI of* 1889), *S.* 90.

Shri Beharilalji Bhagwatprasadji *v.* Bai Rajbai, Widow.

A testator by his will, gave his widows a right to receive maintenance from the profits of his immoveable estate subject to the limited power of sale or mortgage conferred upon his executrix for a special purpose. It was found that a large part of the property was sold with the object of defeating the claim to maintenance of plaintiff, one of the widows, and that the purchaser was aware of the fraud practised upon the widow.

Held that the widows were under the terms of the will in a position exactly analogous to, if not more favourable than, that of a widow entitled, under the general Hindu Law, to maintenance out of the family property in the hands of one of the surviving members of such family, and that plaintiff's right to maintenance remained unaffected against the property in the hands of the purchaser, whether under Section 39 of the Transfer of Property Act (IV of 1882) or the law prevailing in force,

irrespectively of the possibility of her claim being satisfied from other property. What was honestly purchased was free from her claim for ever. What was purchased in furtherance of a fraud upon her or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first.

Held, also, that S. 90 of the Probate and Administration Act (V of 1881 as amended by Act VI of 1889), does not preclude the application of the equitable principle on which the decision in *Lakshman* v. *Satyabhamabai* (I. L. R., 2 B., 494) is based and which has been embodied in S. 39 of the Transfer of Property Act. S. 90 gives the executor merely the ordinary powers of sale that an ordinary owner would have in so far as they are not limited by the will, and as such those powers would be subject to the usual rules of equity:—*Printed Judgments of the B. H. C. for* 1898, p. 270.

Hindu Law, liability of other members of family when manager sued alone—Manager, suit against, of Hindu family for debt incurred as manager and for family purpose, binds other members of family—Hindu family—Debt incurred by manager binding against other members in what cases—Decree—Court-sale—Property of Hindu family.

Sakharam bin Ranoji *v.* Devji Antoba.

Where a debt is incurred by a Hindu as the manager of the family and for a family purpose, the other members of the family as well as the sons of the debtor, though not parties to the suit are bound by the decree passed against him, and the whole interest of the family in the properties of the family passes at a Court-sale held in pursuance of such decree:—*Printed Judgments of the B. H. C. for* 1898, p. 282.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

The Code of Criminal Procedure with Notes by Chintaman, H. Sohoni and *Published by Thacker Spink and Co., Calcutta*:—Price Rs. 13.

General and American Digest, Quarterly Advance Sheets for July 1898. *Published by the Lawyers' Co-operative Publishing Company, Rochester, New York*:— Price $. 1

The Albany Law Journal for September (*in exchange*).
The Calcutta Weekly Notes for September (*in exchange*).
The Allahabad Weekly Notes for September (*in exchange*).
The Green Bag for September (*in exchange*).
The Canadian Law Times for September (*in exchange*).
The Canada Law Journal for September (*in exchange*).
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The Indian Journal of Education for September (*in exchange*).

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Petheram on the Privy Council:—There is an interesting article in the Law Quarterly for October upon the administration of the Hindu Law by the Privy Council from the pen of *Sir Comer Petheram*, ex Chief Justice of Calcutta. The tenor of his observations is to show that the Privy Council often decides in ignorance of the Hindu Law. There is considerable force in the argument, but the implication contained in the article that the decisions of High Courts in India are satisfactory does not appear to be warranted. After the establishment of the High Courts in India under the Queen's Charter, there have been no doubt several eminent Judges whose knowledge both of Indian and English law was such as to make them ornaments of any judiciary. But the deterioration in the quality of judicial appointments has been very marked in recent years. The Civil Service has not shown very much partiality for law so as to produce men of the calibre and attainments of a *Holloway* or a *West.* How few are the English Judges administering Hindu Law in India who can claim to have read Colebrooke's Translation of the Mitakshara from beginning to end, not to speak of other works upon Hindu Law? It may be said that the department of Hindu Law is not the only field where justice is administered in ignorance, but that judges often show ignorance of the fundamental principles of other departments of law. There are judges whom one would have no difficulty in naming who have not studied the leading text books upon the leading topics of law. But all this only makes the argument for the better training of our judges more complete. Unless Civil Servants are posted as Assistant Judges without the chance of reverting to the executive line, it would be impossible to expect any improvement in the quality of civilians available for the High Court Bench. As for the barrister judges, we think, the Secretary of State ought to exercise more judgment in the selection of men. *Sir Comer Petheram* himself was no brilliant specimen, though there are judges who are decidedly his inferiors. It is essential that confidence in the capacity of the highest tribunals in the land should not suffer. With

the steady improvement in the capacity of the indigenous bar on the one side and the growing deterioration of the quality of our judges on the other, the short comings of the Bench are increasingly felt. It is time for the Government to look into the matter and devise a proper remedy.

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Statistics of Law Schools in America :—The statistics of law schools, collected annually for the bureau of education at Washington, for a synopsis of which we are indebted to Mr. A. Erskine Miller, statistician of the department, show a very rapid increase in the number of students of law, an increase twice as great as that in medicine, and still greater than that in theology. The table furnished by the American Bar Association showed an increase in 1898 of more than a thousand law students over the number in 1897. During the ten years ending in 1897 the number of students in theology increased only 30 per cent., not quite as fast as the whole population at the last census. Students in medicine increased 108 per cent., while the students in law increased 228 per cent. Dental students increased faster than any other class, viz., 284 per cent. in ten years. In 1897 the number of medical students was 24,000, law students 10,449, theological 8,000, and dental 6,500. But in 1898 the number of law students has increased to 11,600. This rapid increase in the number of law students continues from year to year. The committee on education of the American Bar Association, of which Judge George M. Sharp, of Baltimore, is a member, endeavored to ascertain the cause of this seemingly abnormal increase. But the cause seems hard to find, possibly because there is no one cause, but a combination of causes. Is it not probable that the increased number of law students reported is attributable to this: that young men are no longer contented with the desultory instruction furnished them in the offices of practising attorneys, but rather seek the regular and systematic instruction of a law school, where they receive the stimulating influence of a large number of young men interested in the same subject and vieing with one another in the acquirement of such knowledge? That this is probably the true explanation is indicated by the fact that in 1887 there were only 50 law schools, but in 1897 there were 77. If this be the true explanation, future attorneys will have about the usual number of competitors, but they will find a victory in the court-room harder to win :—*The Albany Law Journal.*

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Constitutionality of Anti-Ticket Scalping Laws :—In New York, as well as in several other States of the Union, laws forbidding the

sale or barter of railway tickets by scalpers and unauthorized brokers have been sustained. Recently, however, Judge Gibbons, of Illinois, held the Anti-Scalping Law of that State to be unconstitutional, basing his decision on the fact that a railway ticket is not a receipt for the money paid for transportation, but is personal property or a chattel or a contract, and as such may be sold, transferred or given away. A ticket, says Judge Gibbons, like a promissory note, is evidence of an obligation incurred and a right earned. "It is evidence of the holder's right to travel over the roads specified thereon, and where not limited to any particular person, may be sold, transferred or given away the same as the owner of a promissory note may make a gift, sale or transfer thereof." While conceding that railroads and other common carriers, impressed as they are with a public duty, may be the subject of legislative control and regulation, Judge Gibbons holds that when, from this premise, the conclusion is drawn that the legislature under its police power may enact any law which is not directly barred by some constitutional provision, a dangerous and fallacious principle is sought to be established. The police power, says the Judge, is simply that power and dominion inherent in every government over the individual which may be exercised in case of necessity for the protection of the general public. Whether any necessity really exists it is for the legislature to decide, but the reasonableness of any law enacted to meet it is always open to inquiry by the judiciary. The legislature, concludes Judge Gibbons, cannot, under the guise of the police power, prohibit the sale of wholesome food or declare that to be criminal which in its nature cannot be destructive of morals or detrimental to the well-being of the people. The case will, of course, go up to the highest court, Judge Gibbons himself being desirous that the important questions presented should be passed upon by the tribunal of last resort;—*The Albany Law Journal.*

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Legal Laugh:—At dinner, at Bolliol, the master's guests were discussing the careers of two Bolliol men, one of whom had just been made a judge and the other a bishop. "Oh," said Henry Smith, "I think the bishop is the greater man. A judge at the most, can only say 'You be hanged,' but a bishop can say 'You be damned.'" 'Yes," characteristically twittered the master; "but if the judge says 'You be hanged,' you *are* hanged.":—*The Albany Law Journal.*

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Notes of American Cases.

Payment of a cheque after the maker has been declared to be insane, and is so, is held, in *American Trust & B. Co.* v. *Boone* (Ga.) 40 L. R. A, 250, to be at the peril of the bank, although it does not know of the insanity of the drawer, and although the adjudication of insanity was made in another state.

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Interference with ownership of land by advertising and selling it under a fraudulent mortgage and notifying the tenants not to pay rent to the owner is held, in *Gore* v. *Condon* (Md.) 40 L. R. A. 382, to constitute an actionable wrong so far as it damages the interest in the real property, but not on account of the disgrace and disrepute into which the owner is thereby brought.

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The union of a fire for which no responsible cause can be ascertained, with one which was due to the negligence of a known person, is held, in *Cook* v. *Minneapolis, St. P. & S Ste. M. R. Co.* (Wis.) 40 L. R. A. 457, to preclude any recovery against the latter, where it is found that either fire alone would have been sufficient to cause the damage.

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The hypnotism of an accused person is held in *People* v. *Ebanks* (Cal.) 40 L. R. A., 269, insufficient to render evidence of statements made by him while under the influence admissible in his favor at his trial. With this case is a note collecting the judicial decisions, and also the opinions of the writers on the subject, concerning hypnotism.

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An insane delusion of an aged woman as to the superhuman powers of a man much younger than herself, and whose character for morality was notoriously the opposite of her own, is held, in *Orchardson* v. *Cofield* (Ill.) 40 L. R. A. 256, to render her incapable of contracting a valid marriage with him or making a will in his favor.

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Allegations that a child less than two years old was capable of rendering and did render valuable services to the parents by doing errands and performing services about the house, such as bringing fuel and caring for a younger child, are held, in *Southern R. Co.* v. *Covenia* (Ga.) 40. L. R. A. 253, to be insufficient to state a cause of action for the loss of the child's services, as the court will take judicial cognizance of the fact that such a child is incapable of rendering valuable services.

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Counsel as Witnesses.—The *Indian Daily News*, quoting the *Weekly Notes*, says: "A question of some interest to the legal profession came under discussion last Thursday during the course of the trial of the

Queen Empress v. *D. M. Gasper*, which is proceeding before Mr. Justice Jenkins and a common jury. The prosecution desired to prove that the report, which had appeared in a certain newspaper of the address of the counsel for the defence in the case of the *Queen Empress* v. *O'Connell* was incorrect and for that purpose they called Mr. R. Allen, the counsel in question. Mr. Allen who is a member of the Irish Bar and an advocate of the Calcutta High Court, pleaded privilege on the ground that he was not a compellable witness and the case of *Curry* v. *Walter* (1 Espinasse 456) was cited in support of his contention. Mr. Barrow, on behalf of the prosecution, contended that, under Sec. 118 of the Evidence Act, persons are declared to be competent witnesses except such as are wanting in intellectual capacity, and that all persons were compellable witnesses with the exception of those dealt with by name in sections 121 to 132 and then only under the circumstances indicated in those sections. His Lordship observed that the point was no doubt an interesting one, but was of opinion that he was precluded from deciding it in as much as Mr. Allen had entered into a bond before the Police Magistrate to attend at the sessions and give his evidence, and must on that account be considered to have waived his privilege, if such there was. Mr. Allen accordingly entered the witness box, and was examined and cross-examined as to the accuracy of the report in question. 'It is to be regretted that the provision of Section 217 of the Criminal Procedure Code under which Mr. Allen appeared to give his evidence stood in the way of a ruling from the learned judge on a point which is as important as it is novel in this country. In England the case of *Curry* v. *Walter*, to which reference was made in the argument, has clearly laid it down that a barrister cannot be called as a witness without his consent to prove what was stated by him on a motion before the Court. In that case Mr. Erskine was subpœnaed to prove that he had moved the Court in a certain matter, and that he had in fact, stated on that application what the newspaper had reported him to have said. On Mr. Erskine's coming into Court, Sir James Eyre, L. C. J. said that he was of opinion that a barrister should not be called as a witness to prove such a circumstance, but that the party should prove it by other means or by other witnesses who were present at the time of the motion; but that it should be at the option of the counsel whether he would give his testimony or not. Mr. Erskine thereupon said that he would not volunteer, the giving of evidence on such an occasion and retired. The case, it is to be observed is cited as an authority for the proposition it lays down in the latest edition (1895) of "Taylor on Evidence" (9th edit. vol. 1, p. 611) and in "Best on Evidence" (8th edit. p. 171) the learned authors say with regard to the general principle: "There can be no doubt that to call an advocate in the cause as a witness is most objectionable, and should be avoided wherever possible, but we apprehend that a judge has no right in point of law, to reject him."

The Indian Evidence Act is however silent on the point, and it may be argued therefore that under that Act a barrister except under the special circumstances mentioned in Sections 126 to 129, is a compellable witness, and is not entitled to plead privilege. But it is a question whether in the capacity as members of the English, Irish or Scotch Bar, (as the case may be) counsel do not posess special privileges, and whether in connection with the particular point under consideration, they are not governed by the principle laid down in *Curry* v. *Walter*. In *The Queen Empress* v *Ghulet* (1884) I. L. R., 7 A. 44 it was held by *Mr. Justice Straght* and *Mr. Justice Duthoit* that where the Indian Legislature has not followed the law o England, English cases are irrelevant, but in the present case there is no dissent from but merely silence in regard to the rule in *Curry* v. *Walter*. It is well worth considering whether, in the interests of public policy section 121 of the Evidence Act, which privileges judges and magistrates from answering any questions as to their conduct in Court as judge or magistrate, should be extended to counsel and that they should not be compellable witnesses except of course with regard to matters unconnected with their appearance in a professional capacity:—*The English Law Journal.*

REVIEWS.

Quarterly Advance Sheets for July 1898, of the General Digest American and English, published by the Lawyers' Co-operative Publishing Company, Rochester, New York—*Price* $ 1. We have already recommended this publication to our readers as the best of English and American Law Digests. It fulfils the ideal of what a law digest ought to be. The present number maintains the standard of excellence attained in the previous issues.

The Code of Criminal Procedure with Notes, by Mr. C. H. Sohoni, published *by Messrs. Thacker Spink & Co., Calcutta :—Price, Rs.* 13. This is perhaps the most useful commentary on the Code of Criminal Procedure. Mr. Sohoni has incorporated in this edition all the changes introduced by Act V. of 1898, the amendments being indicated in italics. The arrangement of the notes under distinct headings is a valuable feature of the book and a merit which is not possessed by the Commentaries of Prinsep or Henderson.

The Madras Law Journal.

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CIVIL JUSTICE IN THE MADRAS PRESIDENCY.

We have often remarked that the report of the High Court on the administration of civil justice in the Madras Presidency is more or less a mechanical appraisement of the work done by judicial officers and a mechanical array of the statistics of litigation. The review of these reports by the Government is also usually a mechanical performance administering praise and blame with reference to the quantity of work turned out by judges. The report on the administration of justice for 1897 and the order of the Government in review of it are no exceptions to the rule. It must be admitted that there is very considerable difficulty in determining the quality of the work done by the different courts. But it is all the same a source of discouragement to many a hard-working, conscientious and able officer that his efficiency is judged more by reference to the quantity of his work and his expeditiousness than by reference to its quality. We have often remarked upon the tendency of this kind of criticism to encourage undue speed in the disposal of work to the detriment of justice. We shall, therefore, deal with this part of the subject and make certain observations of a general character before dealing with the work of the different classes of courts.

The first thing that strikes one upon a perusal of the report is a large increase in litigation during the year 1897. The total number of suits instituted in all the Courts in the Presidency including the Revenue and Village Munsifs' courts, was 362,502, or an increase of 27,022 suits over the figures for 1896.(1) There has been an increase in the number of institutions in all the courts, except the revenue courts, where a falling off is to be observed.

(1) There seems to be a discrepancy in this matter between the statement in paragraph 12 of the report and in page vii of the Appendix, where the total is given at 311,001. The number of suits before the courts in 1897 cannot possibly be less than the number of institutions.

Is this increase in litigation any matter for regret? Of course, we put the question only from the public point of view, and not from the professional. An increase of litigation may be due to a variety of circumstances and unless it indicates the growth of litigiousness or a spirit of unwillingness to perform legal obligations it is no cause for regret. The increase may be due to an increase in the number of transactions owing to a period of good season and high credit, or it may be due to a bad season and low credit and a desire to realize claims quickly, or to a number of other causes. While we are not aware of any reasons for regarding the increase of litigation during the last few years with any apprehension, it is worth while to consider whether the statistics of litigation support the charge so often hurled against the people of this country that they are a litigious race and are never satisfied with the decision of a single court, but are fond of appeals to several courts. A careful examination of the statistics of litigation proves the charge to be unwarranted. Several tests may be applied for this purpose, and the result of this test is certainly not in favor of any such conclusion as that referred to above and hastily arrived at by Anglo-Indians who are fond of generalizing from their experience of this country. Take first of all the ratio of suits instituted in all the courts in the Presidency for the total population. For a population of 35,630,440, the total number of suits before the village courts and the civil courts during the year 1897 was only 362,812, which gives a proportion of one suit for every 98 people, or of 1,020 suits for every 100,000 persons. During the year 1896, the latest year for which figures are available to us, the ratio of suits to population in England and Wales was 3,966 for 100,000.

Roughly speaking, the ratio in England was nearly four times the ratio in Madras. We are aware that there are numerous differential circumstances to be taken into account, and any comparison of figures would not be quite safe which proceeded upon the assumption of a complete similarity of conditions between England and India. Making, however, full allowance for the enormous commercial activity in England, for the vast multiplicity of transactions which such activity must involve, it may be said that the figures for India are by no means so large as to give rise to any feeling of alarm or complaint. Another test which may be applied is to consider the proportion of appeals to the appealable cases and of the number of

civil revision petitions in Small Cause cases to the total number of Small Cause suits. Out of a total of 147,169 Small Cause suits instituted in the Provincial Small Cause Courts, revision petitions were presented to the High Court in only 279 cases. The proportion of appeals to appealable cases disposed of by District Munsifs was only 6,797 to 56,652. As suits increase in value, there is no doubt that this proportion also increases. But this is only natural. The pecuniary jurisdiction of the Sub-Courts and District Courts embraces suits of a greater value than Rs. 2,500. And in many cases the valuation adopted for purposes of court fees does not adequately represent the market value of the property in suit. Thus we find that out of a total of 779 appealable decrees passed by the Sub-Courts, 645 were appealed against, and out of a total of 339 appealable decrees passed by the District Courts, 187 were appealed against. This tendency of the proportion of appeals to rise in proportion to the value of the suit may be noticed in England also. While appeals from inferior courts are comparatively few, the proportion of appeals to the Court of Appeal from final judgments or orders of the Chancery Division was in 1896, 167 to 460. The proportion of second appeals from the appellate judgments of Sub-Judges was only 624 to 2,972 contested appeals. The proportion of second appeals from the appellate judgments of District Courts was 1,605 to 8,061. The principle that the chances of an appeal being preferred are greater in regard to suits of large value does not hold good in case of Privy Council appeals, in regard to which various circumstances operate as deterrents. It is significant, however, that the proportion of appeals from India to the Privy Council as compared with the total number of appealable cases is extremely small. (See Civil Judicial Statistics for 1896, p. 19.) Yet another test is the proportion of cases decided in favor of the defendant. Suits which are decided in favor of the plaintiff cannot be assumed to be frivolous or vexatious. By far the greater number of the suits instituted in the courts are instituted for the prosecution of honest claims and rendered necessary, not so much by the wilful denial of the plaintiff's rights by the defendant as by his inability to fulfil his engagements and the desire of the plaintiff to realise his claims with despatch. Out of a total of 256,789 suits instituted in the civil courts of the Presidency, judgment was given for the defendant, or the suit was dismissed *ex parte* only in 21,748 suits. The suits which are disposed of with-

out trial are generally so disposed of in consequence of a settlement of the plaintiff's claim by the defendant.

We have already referred to the fact that there were only 52 appeals to the Privy Council from the whole of India in 1896 as an indication of the poverty of litigants. A better proof is furnished by the small value of litigation generally in the country. Out of a total of 362,512 suits instituted in all the Civil and Revenue courts in the Presidency, the number of suits exceeding Rs. 500 in value, including suits the value of which could not be estimated in money, was only 11,041; and the number of suits exceeding Rs. 1,000, including those which could not be estimated in money, was only 4,995. Small as the amounts in question are, their value to the people who litigate about them is relatively very high. In this connection it is necessary to consider whether the scale of court-fees levied by the Government does not work hardship upon the large mass of poor litigants who seek the assistance of the courts. It is curious to note that the scale of court-fees adopted by the Court Fees Act has been so framed as to bear more hardly upon the poor suitor than upon his richer brother. The rate of *ad valorem* fee leviable upon suits not exceeding Rs. 1,000 is 7½ per cent. of the valuation. But as the value of the suit rises, the rate of court-fee falls. If a litigant with an honest claim has the misfortune to be defeated in two courts and has to seek the assistance of the High Court on second appeal, he would be obliged to spend 22½ per cent. of the value of the property in the shape of institution fee alone, not to speak of the various other expenses which have to be incurred. The different scale of court-fees and the high rates adopted appear to be specially designed to put obstacles in the way of the poor suitor. A stock argument used by the apologists of the present system is that any reduction of court-fees would open the door to a flood of litigation. It is idle to suppose that simply because the institution fee is lowered, people will be tempted to bring in false claims before the courts. False claims are made and will be made under any system of court-fees; and the proper mode of deterring such claims is by mulcting such claimants in costs and not by imposing a heavy court-fee, the difficulty of securing which may operate hardly upon the honest as well as the dishonest suitor. In illustration of our remarks, we may

refer to the new City Civil Court at Madras which has abundantly justified its existence and falsified the forebodings of the persons who opposed its creation. When it was pointed out that the scale of fees in the High Court was such as to throw a comparatively heavy burden upon the suitor in small cases, it was claimed that the High Court system had the merit of repressing litigation and that the people of Madras would be demoralized by a cheap court. The result is instructive.

The annual average of suits instituted in the High Court not exceeding Rs. 2,500 in value during the years 1887 to 1892 was 134. The number of suits instituted in the City Court in 1897 was 381. This means that about 250 suitors per annum were denied justice under the old system. Nor can it be said that these suits were frivolous, when it is remembered that out of a total of 434 suits disposed of during the year, only 125 suits were decided for the defendant. A system which aims at repression of dishonesty by measures productive of hardship to honest people as well stands self-condemned. Nor can the present system of court fees be justified on the ground that it is necessary for the purpose of defraying the cost of administration of justice. Year after year the Government makes an enormous profit by the dispensing of justice.

The surplus revenue derived by the Government after meeting all the charges of the Civil and Criminal courts of the Presidency during the year 1897 was Rs. 14,59,370. Judges and legislators in India often talk with virtuous indignation of the traffic in litigation in this country and are eager to lay down rules to check such traffic.

If any one in this country traffics in litigation and reaps a large profit out of it, it is the Government itself which reaps an enormous profit out of justice every year. We believe the spectacle of a civilized Government making the administration of justice a source of national income will be found to be rather rare. In England the administration of justice far from being a source of income, is a source of expenditure. For the year 1896, the excess of expenditure over receipts for the County and Superior Courts was £ 276,642. It will be well if the Government directed its attention to the reduction of the scale of court-fees, to the introduction of greater

uniformity in the scale and to an increase in the number of the courts and an improvement in their efficiency. A part of this large surplus may well be devoted to the creation of more Munsifs' and Sub-Judges' Courts which will bring a much needed relief to a hard worked class of officers and allow them a little more time to study the law of the cases coming before them and a little more leisure to study their cases than they are at present able to devote with a constant fear of statistics before their eyes.

As to the tests adopted by the High Court for determining the efficiency of judicial officers we have to observe that they are imperfect and fallacious. The so called appeal test adopted by the High Court consists in ascertaining the proportion of appeals to appealable decrees and the percentage of confirmation in appeals. The latter test cannot be regarded as very satisfactory, regard being had to the organization and personnel of the judiciary. If the judiciary were properly appointed, there would no doubt be a presumption that the judgment of the appellate Court is the sounder. But the presumption cannot safely be applied. The consistent application of the confirmation test leads to the conclusion that the efficiency of the courts decreases as the rank of the court rises The ratio of confirmation in appeals from appealable decrees and orders passed by Munsifs is 4,850 out of 7,771 or 62 odd per cent. The ratio of confirmation in appeals from appealable decrees passed by Sub Courts is 194 out of 333 or 58 odd per cent. In appeals from decrees of District Courts the ratio of confirmation is 99 to 167 or 59 odd per cent. In second appeals from the appellate judgments of Sub-Judges the proportion of decrees confirmed to the total number of appeals is 513 to 786 or 65 odd per cent. In second appeals from the appellate judgments of District Judges the per centage of confirmation is 48 odd per cent, 877 cases having been confirmed out of 1817 appeals. If the test of confirmation in appeal proves anything, it proves that the chances of a right judgment are less in the higher courts than in the lower courts. It is somewhat strange that while the report gives the figures of confirmation and appeals for all the subordinate courts in the Presidency, it is altogether silent in regard to the number of cases confirmed on appeal from the Original Side of the High Court and on appeal from the High Court to the Privy Council. The information would certainly be interesting.

Another test of efficiency adopted by the High Court is the proportion of appeals to appealable decrees. This is a far more valuable test than the other one we have dealt with. If a party has the right to appeal against a decree passed against him but does not choose to do so, it is a very strong indication of the fact of his being satisfied that the judgment passed against him is not unjust. We are not unaware of the fact that suitors are very often deterred from preferring appeals by an indiscriminate confirming tendency on the part of the appellate courts or by their own poverty. Making allowance, however, for the influence of the idiosyncrasies of appellate courts and other deterrent circumstances, we think that this test is really very valuable provided the figures are carefully ascertained.

One serious error which vitiates the figures furnished in the report is that in calculating the number of appealable decrees and orders, decrees and orders passed in uncontested suit or appeals are included. In very exceptional cases a party who has not contested a suit may perhaps appeal. But such instances are few and negligible. It would be really useful if the report gave the proportion of appeals to the appealable decrees and orders passed after contest. We have tried to ascertain the proportion of appeals in contested suits and appeals and the results are given below :—

Courts.	Number of appealable decrees and orders passed.	Number appealed against.	Percentage.
District Munsifs' Courts.	36,522 (Contested suits.)	6,797	18 odd.
Sub-Courts	708 do.	345	44 odd.
District Courts ...	339 do.	187	55 odd.
Sub-Courts (in the exercise of appellate jurisdiction.)	2,714 (Contested appeals.)	624	Nearly 23.
District Courts (in the exercise of appellate jurisdiction).	7,033 do.	1,605	22 odd.
City Civil Court ...	241 Contested suits.	24	Nearly 10.

There are a number of errors affecting even the table we have compiled in regard to second appeals. This table does not show nor does the report of the High Court show in how many of the decrees and orders passed by the appellate courts a second appeal was com-

petent under S. 586 of the Code of Civil Procedure. Another fact which must not be lost sight of is that as the value of the suit rises, there is a greater tendency to appeals than in small suits. The conclusion which is suggested by these figures is that the lower tribunals command even more confidence in the soundness of their decisions than the higher tribunals. It may be asked why if the lower tribunals command confidence there are so many appeals from their decisions, or why any appeals should be allowed from their decisions. With all their efficiency, however, it is impossible to expect the lower courts to be invariably right in their decisions. In the very nature of things there must necessarily be a certain percentage of erroneous decisions in these courts, and it is only natural that the parties who are dissatisfied with the erroneous decisions should desire an appeal to a higher tribunal for obtaining that justice which has been denied to them by the court below. Litigants have a right to demand that law and justice should be properly administered and that the machinery for the administration of justice should be so devised as to eliminate or reduce the chances of error and injustice.

What is at fault is not the system of appeals but the mode in which judges are appointed to appellate courts. If greater care were bestowed upon the selection of judges for higher tribunals, the system of appeals could be made as efficient as possible.

Passing on to the work done by the different classes of courts during the year, we find that the work done by the District Munsifs is in quantity and quality of a very satisfactory character. During the year 1897 the total amount of work done by the 114 District Munsifs consisted of 81,690 ordinary suits, 126,169 small cause suits, 186,662 execution petitions, 414 insolvency petitions and 278,841 miscellaneous petitions—a record of work which will compare favorably with that turned out by any class of judicial officers in any part of India. It is obvious that the enormous mass of work represents a very heavy strain upon the energies of District Munsifs —a strain which the Government is bound to reduce by the creation of more District Munsifs both in the interest of justice, suitors and in the interests of its own officers. There is one part of the work done by the District Munsifs which we are afraid is often done in a perfunctory manner and that is in regard to the small cause

work. The tendency, however, is one which can be easily corrected by the free admission of revision petitions and by a greater frequency of interference in revision.

The Presidency Small Cause Court and the City Civil Court of Madras have both a very satisfactory record of performance to show for the last year. The courts which had the lightest work are the District Courts. The total amount of work done by the District Judges during the year under review consisted of 511 ordinary suits, 738 small causes, 8,061 regular appeals, 356 miscellaneous appeals, 1,759 execution petitions, 22 insolvency petitions, 15,403 miscellaneous petitions, 1,129 sessions cases and 1,835 criminal appeals and revisions. The work done by the District Courts must be pronounced to be of not a very satisfactory character whether regard is had to the duration of suits in the District Courts or the proportion of appeals to appealable decrees or the ratio of confirmation of the correctness of the decisions in law or in fact. We have no wish to disparage the work done by these officers, but it must be stated that the efficiency of this class of officers has considerably diminished and is bound to diminish still further unless steps are taken to separate the Judicial from the Executive branch and the Judges are specially trained for the discharge of their duties. In Bombay where the separation of the two branches has been made, the Civilian Judges are far more capable officers than the District Judges in this Presidency.

VALIDITY OF ADOPTION DEVESTING ESTATE.

The rule laid down by the Privy Council in *Chandraballi's* case that an adoption not made to the last full owner and which has the effect of devesting an estate vested in some person as the heir of another was invalid has not been free from difficulty with regard to its applications. There is no Hindu text relied on by their Lordships in support of that view, but their Lordships explain themselves in later cases, *Padma Coomari* v. The *Court of Wards*, 8, I. A., 229 *Thayammal* v. *Venkatarama*, 14 I. A., 67, and *Tharachurn* v. *Sureshchunder Debi* 16, I.A., 166, as laying down not merely that the adoption did not devest the estate but that the power to adopt has become exhausted and that the adoption itself is invalid, because the spiritual

reasons that justified the concession of the power to adopt no longer existed to keep it alive. It is too late in the day to discuss the soundness or propriety of the rule even if the judgment of so high an authority could be assailed. We are more concerned with the applications of that rule to other cases or the definition of the exact scope of the rule itself. The Privy Council themselves declined to extend the rule to a case where an adoption was made to the last full owner himself, even though it had the effect of devesting the estate, which had vested in his brother. Following the same principle, the Bombay High Court has refused to impeach the validity of the adoption made by the last full owner where it had the effect of defeating the estate of co-widows, *Ramji* v. *Ghaman* I. L. R., 6. B., 498; *Amava* v. *Mahadgauda Ib.* 22, B. 416. These cases are no exceptions to the rule, but only illustrations of the principle, that it is not the mere devesting that affects the validity of the adoption, but the fact of its being made to a person other than the last full owner. It does seem to be an exception to the rule where an adoption is made to the mother of the last male owner, the property having passed to her as heir to her son on his death leaving no widow or issue. See 4. I. A., p. 1. The only justification for this is that it has the effect of devesting no estate but her own. But this is not altogether accurate, because it would have the effect of defeating the estate of reversioners who are entitled to the property after the mother. *Gavadappa* v. *Girimallappa* I. L. R., 19, B., 331. Nor does it seem in this case that the mother's estate is devested, for the adopted son is only a brother to the last male owner and is a remoter heir than the mother herself. But if the son in this case had died leaving a widow and the adoption is made after the widow's death and the mother had succeeded to the property, it would still be invalid because on the vesting of the property in the son's widow the power to adopt was at an end and could not be revived by the subsequent death of the son's widow. The validity of the adoption where the mother succeeds to the son directly there having been no intermediate heir, and adopts to her own husband, opens the door to a further question whether the assent of those whose estate would be devested would have the effect of validating adoptions, otherwise invalid. In Bombay, the view has been taken that it would have *Ramji* v. *Ghaman* I. L. R., 6 B., 498. *Rupchand*

v. *Rukhmabai* 8. B. H. C. R., 114, and other cases reported in the printed judgments of Bombay. The Madras High Court, however, has refused to take that view, *Annammah* v. *Mabbu Bali Reddey* 8. M. H. C. R., 108.

The question, however, remains as to the validity or otherwise of an adoption made to a deceased member of an undivided Hindu family when the family itself continues in the persons of members, who, it may be, were or were not in existence at the time of the death of the person to whom the adoption was made. This was very fully discussed in *Chandra bin Babu* v. *Gojara Bai* I. L. R., 14 B., 463, where the following principle is deduced:—"That adoption by a widow under her husband's authority has the effect of devesting an estate vested in any member of the undivided family, of which the husband was himself a member. But it does not devest the estate of one on whom the inheritance has devolved from a lineal heir of the husband." We do not suppose that *Mr. Justice Telang* in the last case meant to lay down that those members of the undivided family whose estate would be devested should have been in existence at the time of the husband's death. Hence, supposing there were two brothers, one of them dies leaving a widow, a son is subsequently born to the other and that other also dies, an adoption since made to the first brother dying would be valid, notwithstanding the fact that the nephew was not a member of the undivided family at the time of his uncle's death. As regards the second branch of the rule deduced by *Mr. Justice Telang* that it does not devest the estate of one on whom the inheritance has devolved from a lineal heir of the husband, there is some difficulty. We presume that stress is laid on the fact that property should have passed by inheritance from the lineal heir. We have already pointed out that the case of the mother succeeding to the lineal heir of her husband, the son, is treated as an exception. The son himself might have taken the property by survivorship, though he would then be not strictly the lineal *heir*, but a lineal survivor. In the case of a family of father and son having joint property and the son dying first leaving a widow, the father would be the lineal heir in the loose sense in which those words were employed by *Mr. Justice Telang*, and if the property pass from the father to the father's widow, the subsequent adoption by the son's widow would be deemed to fall within the rule against the devesting of an estate vested by inheritance in a lineal heir of the husband. But we

have to ask the question whether there is anything in the decisions of the Privy Council to justify the broad terms in which this rule is laid down. The cases before the Privy Council were generally the cases of the mother-in-law making the adoption after the vesting of the estate in the daughter-in-law; and there is nothing in the language employed by the Privy Council to justify the proposition laid down by *Mr. Justice Telang* in the broad terms he has employed. There are, however, cases of adoption by the daughter-in-law after the estate has vested in the mother-in-law being declared invalid. See *Shri Dhamidhar* v. *Chinto* I. L. R. 20, B., 250. The argument would be the same where instead of the mother-in-law the estate has vested in some other heir, a brother or other collateral of the father-in-law. So also in a recent case decided in Madras, *Ratna Mudaliar Ragunada Bhattar* 8, M. L. J. Rep. 173, where the estate had passed from the father-in-law to his brothers; adoption by the daughter-in-law was held invalid. These decisions would appear to be in conflict with a case in I. L. R., 21 B. 319, where the adoption by the daughter-in-law after the estate had passed from the father-in-law to his brother was held valid. True, their Lordships in that case relied upon the assent of the father-in-law's brother whose estate was devested in support of the validity of the adoption. But in Bombay where a widow is competent to adopt without any authority, the assent of those whose estate would be devested even in cases where the adoption would not fall within the rule of prohibition laid down by the Privy Council would appear to be necessary See *Ramji* v. *Ghaman* I. L. R., 6 B., 498 and *Dinkar* v. *Ganesh Ib.* 505.

The materiality, therefore, of consent is outside the present question which is whether the power of the daughter-in-law to adopt is not exhausted. It appears to us that some important considerations have been lost sight of in the discussion of this question. One passage in the judgment of *Farran,* C. J., in the case of *Babu Anaji* v. *Ratnoji Krishnarau* I. L. R. 21 B. 319, is very suggestive. His Lordship observes at p. 325 : "The adoption when made ensures for the benefit not of the adoptive father alone. It benefits also the immediate ancestors of the adoptive father." In para. 13, S. 1 of the Dattaka Mimamsa, the following occurs:—

"By a man destitute of a son. The word *son* here used is inclusive also of the son's son or grandson, for through these the exclusion from

heaven denounced in such passages as 'Heaven awaits not one destitute of a son' is removed, since it is declared in the text subjoined that the mansions of the happy are attained through the grandson and the other. By a son a man conquers worlds, by a son's son he enjoys immortality, and afterwards by the son of a grandson he reaches the solar abode."

The principle of the above passage is that a grandson is as good as a son, and it follows that the adoption of a grandson has as much efficacy as the adoption of a son. The same rule is also enunciated in the Dattakachandrika. From this, we argue that an adoption by a daughter-in-law is as much an adoption to the last male owner, the father-in-law, as it would be, if her husband was the last male owner; only in the former case the adoption is of a grandson to the last male owner. If the father-in-law had been alive, the adoption would not have been invalid, but would have the effect of preventing an adoption by himself or his empowering his own widow to adopt. We are, therefore, of opinion that it is not right to invalidate an adoption by the daughter-in-law after the inheritance had vested from the father-in-law in another, on the ground that the adoption is not made to the last male-owner. A grandson is adopted to the last male owner, and we see no principle in rejecting that adoption as invalid.

CRITICAL NOTE.

GNANA SAMBANDA PANDARASANNADHI *v.* VELU PANDARAM, I. L. R., 19 M. 243.

The questions that arise are the following:—

(1) Has the plaintiff any claim for the establishment of the exclusive right to the management and for exclusive possession?

(2) Is the plaintiff barred from suing for the recovery of the 2nd defendant's share?

(3) Is he barred from suing for the recovery of his father's half share.?

There is no question in the case, of misappropriation or misapplication of trust property. The suit is one to establish the plaintiff's personal right to the management as against the 1st

defendant, and to recover the properties from him. It is assumed that the plaintiff's family had the hereditary right of trusteeship of the Kattalai. The plaintiff's grandfather was entitled to the trusteeship, with his nephew. The right of the grandfather was descendible to his heirs and so also was the right of the nephew. If the nephew died, *leaving no heirs,* then the grandfather might have, as the sole trustee, the right of exclusive management. If the nephew alienated his right of management to another, although the alienation might be invalid under the decision in *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* I. L. R., 1 M., 235, the grandfather would not acquire the right so alienated, but the alienor or his heirs would be stil entitled subject to the Law of Limitations.

In the present case the grandfather died, succeeded by his son. The nephew died, succeeded by the 2nd defendant and his brother since deceased. On behalf of the 2nd defendant and his brother their mother alienated their half right to the trusteeship and their right to joint possession of the properties. We concede that this transfer was invalid. But the invalidity of this alienation only entitled the 2nd defendant and his brother to sue for recovery of the right of joint management and joint possession. The act of the guardian was clearly invalid, and even if it was their own act, it would be invalid according to the decision of the Privy Council in *Puran-Mal* v. *Ali Khan,* I. L. R., 1 M., 235. There would be no estoppel in such a case, for the alienor makes no misrepresentation; nor, if there was misrepresentation, would it raise an estoppel as the representation would relate to a matter of law, namely, the validity of the alienation, and it would be against public policy to defeat the rights of the *cestui que trust* by any estoppel against a trustee. The nephew's sons in this case would be entitled to sue within the statutory period. That the statute would run against a person to defeat the right of management and consequent possession, has been held by the Privy Council in *Balwant Rao Biswant Chandra chor* v. *Purun Mal Chaube* L. R. 10, I. A., p. 90, which has been followed in numerous cases by the High Courts in India. If 2nd defendant's right is barred, the right at the same time is acquired by the person in adverse possession. See *Jagan Nath Das* v. *Birbhadra Das* I. L. R., 18 C., 776, and *Subbaramayyar* v. *Niyamadullah Saheb Ib.*18 M., 542. It is difficult to see how the plaintiff's

father or himself, can acquire the right of the 2nd defendant. If the 2nd defendant has not lost his right, the plaintiff can only be entitled to his half right. If the 2nd defendant has lost his right by operation of the statute, he must have lost it in favour of somebody, and that is the 1st defendant in this case. The plaintiff cannot, therefore, sue to recover more than the joint right of management and joint possession. It is impossible to justify the decree of the High Court giving the plaintiff the sole possession of the properties with the exclusive right of management.

The foregoing discussion naturally leads to the next question, whether the plaintiff in any event would not be barred from recovering the 2nd defendant's share? The High Court observes rightly enough, that "the personal right of trusteeship is not joint, though the rights of trustees against strangers are joint." Here the 2nd defendant's mother alienated on behalf of the 2nd defendant the right to the trusteeship in, September, 1868. And the 1st defendant and his predecessors have held it since then up to the date of suit. We have already shown that the 1st defendant has acquired the right to the trusteeship as against the 2nd defendant, and that the 2nd defendant has lost it. The learned Judges apparently do not dispute this, but they say that plaintiff's father died only in 1884, the plaintiff's right of action accrued then, and 12 years not having elapsed since then, he was entitled to recover. They further observe that although the 2nd defendant's mother alienated in September, 1868, possession did not pass till February, 1869, the date of the plaintiff's father's alienation. Assuming this to be correct for the purpose of argument, we are unable to see what follows from this. Unless it can be said that the plaintiff's father should be regarded as the alienor in respect of the 2nd defendant's share also, there is nothing in the fact that 1st defendant's predecessor took possession in February, 1869. The 1st defendant's predecessor did not hold possession of the 2nd defendant's half share under any claim from the plaintiff's father, or under any title derived from him. It is, therefore, absurd to suggest that in so far as the 2nd defendant's share is concerned, there was any act of plaintiff's father in fraud of the trust. The possession, therefore, by the 1st defendant's predecessor of the 2nd defendant's share, whether it commenced in September, 1868

or in February, 1869, was adverse to plaintiff's father and (assuming that he had a right to sue for the recovery of that half share, which we have already shown he had not, the next day after 2nd defendant's mother's alienation he could have sued for it,) he would be barred by the lapse of 12 years from the date when the adverse possession commenced.

The plaintiff would be in no better position than his father, for whatever would be adverse to him would be adverse to the plaintiff also.

It is an established rule of law that where possession is adverse to a trustee it is adverse to his successor also, and that if the predecessor is barred, the successor is also barred. Whether in the case of an alienation by an immediate predecessor if he is barred by the statute, the successor will also be barred, is a question which we will consider under the next head. But there can be no question that where a stranger holds not under a title derived from the preceding trustee but adversely to him, for example as a trespasser, the successor is barred as well as the predecessor by the operation of the statute. The principle is the same as that involved in cases where the owner of a limited estate, whether a Hindu widow or a Vatandar or a Ghatwal, capable of representing the inheritance, is affected by the adverse possession of a stranger, so as to defeat the right of the reversioner or the succeeding holder of the estate. The principle was fully expounded in a Full Bench decision of the Calcutta High Court by *Sir Barnes Peacock* in *Nobin Chunder* v. *Isvarchander*, 9 W. R., 505 and it has been followed in numerous cases.

The same principle has been expounded in a masterly judgment by Justice *West* in *Radhabai* v. *Anantrav Bhagvant Deshpande* I. L. R., 9 B., 198, 211 212, 224, 225 and 231. The principle of these decisions has received the approval of the Privy Council in *Aumirtolall Bose* v. *Rajoneekant Mitter*, I. L. R., 2 I. A., 113. It may be in cases where the holder of the limited estate does not represent the inheritance, the reversioner or succeeding holder is only barred by adverse possession for 12 years after his right accrued. It has been held in England that the bar of the tenant-for-life does not extinguish the right of the remainder-man. But ad-

verse possession against a tenant-in-tail, who fully represents the inheritance because he can bar the entail, bars the remainder-man-in-tail. See *Tolson* v. *Kaye,* 3 Brod. and Bingh., 217.

In the case of trusts or other offices incapable of alienation, although the estate of a particular holder is limited, and the successor takes *per formam doni,* a decree against one binds the successors. *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen* 2 M. I. A., 392; *Prosunno* Kumari *Debya* v. *Golabchand Baboo* L. R., 2 I. A. 150; *Smith* v. *Lord Brownlow,* 9 Eq. 241; *Philipps* v. *Hudson,* 2 Ch. Ap. 243.

That a right to the trusteeship joint with other people who are lawful trustees, can be acquired by adverse possession goes without saying. There is abundant authority for saying that a limited interest is capable of acquisition by adverse possession—Vide *Madhava* v. *Narayana* I. L. R., 9 M., 244; *Sankaran* v. *Periasami* I. L. R. 13 M., 467. In the case of trusteeship itself it was held by the High Court of Madras in *Nilakandan* v. *Padmanabha* I. L. R., 14 M., 153, affirmed by the Privy Council upon another point *Nilakandhen Nambudirapad* v. *Padmanabha Revi Varma* I. L. R., 18 M., 1, that one could become a joint trustee with others lawfully entitled to trusteeship by mere adverse enjoyment of joint right. Therefore, if plaintiff's father had not alienated his half share, but had continued in joint enjoyment and joint management with 1st defendant's predecessors, 1st defendant would by the Statute have acquired a right to joint management with him, and, therefore, with plaintiff also. The fact that plaintiff's father has also subsequent to 2nd defendant's mother's alienation, alienated his own share, does not prevent the 1st defendant's possession being adverse.

Looked at from any point of view, the point seems to be clear that as regards the 2nd defendant's share in the management, the 1st defendant has acquired a valid right by the operation of the Statute, and plaintiff's right of action, if any, has become barred.

We proceed further and contend that even as regards plaintiff's father's share, plaintiff's right of action is gone. In a case of the alienation of the office of trustee, the alienation is altogether invalid, *Rajah Varmah Valia* v. *Ravi Varmah Kunhi Kutty* I. L. R. I. M., 235. Unlike an alienation by a Hindu widow or a

Vatandar or Ghatwal holder which, although it may purport to be absolute, is good for the lifetime of the holder, the alienor is at once entitled to recover what has been alienated on the ground of the utter invalidity of the alienation. The cases, therefore, in which the reversioner or successor has been held entitled to recover within 12 years of the accrual of his right, have no bearing on the question.

The High Court relies on the decisions referred to below. As regards the decision in *Mahomed* v. *Ganapati* I. L. R., 13 M., 277, the lands were the emoluments of an office, and the holder for the time being could validly alienate them during his life. During the lifetime of the alienor, therefore, there was no possession in the alienee adverse to the successor. The moment the succession opened, and the plaintiff's right to sue accrued, the possession became adverse. Before the lapse of 12 years the suit was instituted, and the plaintiff was held entitled to recover. As regards the decision in *Modho Kooery* v. *Tekait Ram Chunder Singh* I. L. R., 9 C., 411, it was held that the plaintiff there was actually barred, 12 years having elapsed from the date on which the right accrued. It cannot be said that if the period had not elapsed, the Court would necessarily have held that the plaintiff's right of action had subsisted. It was unnecessary for the Court to decide the question, and any opinion expressed cannot have weight. As regards the decision in *Jamal Saheb* v. *Murgaya Swami* I. L. R., 10 B. 34, it appears to have been assumed that the alienation was valid during the alienor's lifetime. The plaintiff being next in succession, there can be no doubt that he was entitled to sue for the recovery of the property within 12 years from the date of his predecessor's death.

As a trustee is entitled to sue for the recovery of that which he has alienated the very next moment after the alienation, the possession of the office by the alienee at once becomes adverse, and it is on this ground that after the lapse of the period the alienor is held disentitled to recover, and not because he has parted with his right. Moreover, the *cestui que trust* who are entitled to proper trustees, are from the moment of the alienation entitled to sue to recover the properties from the alienee on the ground that he is not the lawful trustee. Section 10 of the Limitation Act will not have any application to cases where the suit is merely to recover the trusteeship

Limitation, therefore, must run by reason of the adverse possesion both against the alienating trustee and his successors.

The article of the Limitation Act which would apply to the case is Art. 124 or 144. Whichever article applies, the 3rd column makes use of the words "defendant" and "plaintiff". Section 3 of the Act defines "plaintiff" as including "any person from or through whom the plaintiff derives his right to sue," and the word "defendant" as including "any person from or through whom the defendant derives his liability to be sued." It has been held, however, that a reversioner, although he does not derive his title from the widow is yet sufficiently represented by the widow to justify the statement that he claims from or through the widow. And a Hindu son, who is jointly entitled with the father, is also loosely said to claim through the father. This definition has not been held to preclude the possession against the father or the widow being held to be adverse to the son or the reversioner. The plaintiff would include his predecessors in office and the 1st defendant, likewise his predecessors.

The trustee for the time being represents the estate and the right of the successor does not come into being before the death of the predecessor, or merely by reason of the alienation. Notwithstanding, therefore, the alienation, the right of the alienor lawfully subsists, for he would be entitled to sue for recovery the next moment. And the principle that what is adverse to one trustee is adverse to the successor, and when the predecessor is barred the successor is likewise barred is applicable. It is possible to contend, however, that the alieution of the trusteeship is in fraud of the successor, and it should not be competent to the fraudulent alienor by allowing the statute to elapse, to bar the right of the successor, for, that will be taking advantage of one's own wrong.

It may be said that if the trustee for the time being alienates the office, and the alienee is in possession, he thereby renders himself less capable of representing his successors, or of protecting their right by a hostile action against such alienee. But he no more fails to represent his successors than in cases of adverse possession beginning in trespass, the trustee for the time being, who is lukewarm or indifferent to the interests of the trust fails to represent it or to bar the right of the successors by allowing the statute to run against himself. There is no legal impediment to the alienating trustee

suing to recover the office from the alienee, and he is as fully clothed with all rights appertaining to the office as any of his successors. It, therefore, follows that whether the possession of the office by a stranger was derived from the lawful trustee or had a hostile origin, the successor is barred when the alienor is barred. As observed in *Nilmony Singh* v. *Jagabandhu Roy* I. L. R., 23 C., 545, "each succeeding manager or trustee does not get a fresh start as far as the question of limitation is concerned upon the ground of his deriving title from the former manager." In that case 12 years had not elapsed from the time that the plaintiff's right accrued, but the period having run against the predecessor who made the invalid alienation, the plaintiff was held barred.

TRANSLATED FROM THE MADANA PARIJATA.

CHAPTER VIII.

Partition of heritage.

As divided coparceners only are entitled to perform *sraddha* separately, partition of heritage is described after the chapter on *sraddha*.

Here Narada says :—"That department of law which treats of the division of the paternal wealth by the sons is called by the wise *Dayabhaga* or partition of heritage."[1] *Commentary* :—The word *paternal* is illustratively used of the grandfather. The word *tat* is an adjective qualifying the noun through the verb.

There are four periods for partition. One is when even though the father be alive he desires partition. Another period is when the sons desire it though the father be unwilling, provided the mother is past menstruation and the father does not like the face of women and is not desirous of wealth. Another is when the sons desire it and the father is old, addicted to vice and affliction with incurable diseases though the mother is not past menstruation and the father is unwilling The other is when the father is dead. Of these Yajnavalkya states the first case thus : "If the father makes a partition, he may divide his sons according to his pleasure. He may give the eldest the best share or make all equal shares."[2]

(1) Narada, XIII, 1. (2) Yajnavalkya II, 114.

And partition among the eldest, &c., is thus shewn by Manu:—"The deduction in favor of the eldest is a twentieth part and the most excellent chattel of all; a half of that to the middlemost and a fourth of that to the youngest."[1] *Commentary.* The meaning of this text is:—A twentieth part of the partible wealth and what is most excellent of all the partible chattels should be given to the eldest. A fortieth part and one middling chattel to the middlemost and an eightieth part and the worst of all the chattels to the youngest. They should equally divide and take the wealth that is left after these deductions are made. There are many other similar texts of Gautama and others laying down an unequal division. They are not quoted here for fear of swelling the book. Though unequal division is thus established by the Shasters, still as it is abhorred by the world, this mode of division is not enjoined to be practised on account of the text which says: "That which does not lead to heaven and is abhorred by the world, one should not practice though it is a virtue."[2] The Smriti says:—"Just as the practice of Niyoga and the slaying of a barren cow are not now allowed, so partition with deductions is not now found."[3]

If, however, the father by chance makes an unequal partition it does not become void; so says Yajnavalkya. "A legal distribution made by the father among sons separated with greater or less shares is pronounced valid."[4] *Commentary*:—If legal, *i.e.*, not divorced from law, then it cannot be annulled. This is the meaning. It is in effect said that if it is illegal, it becomes void.

Accordingly Narada also says:—"A father who acts contrary to law has no power in the distribution of wealth."[5]

But where there is no abhorrence of the world to an unequal division, there unequal division certainly takes place as Narada says "A father making a partition may take two shares for himself."[6] *Commentary*:—This also applies to the person making a self acquisition.

So Vasishtha says:—"But he among them who acquires wealth himself shall take only two shares."[7] Among them, *i.e.*, among those entitled to share, the paternal uncles, &c.

(1) Manu, IX. III.
(2) Anonymous.
(3) Anonymous.
(4) Yajnavalkya II, 116.
(5) Narada XIII. 16.
(6) Narada XIII. 12.
(7) Vasishtha XVII. 51.

Narada after saying "They shall divide the wealth equally," states the second case thus: "When the mother's menstruation has ceased and the sisters have been married and when the father has turned away from sexual enjoyment and his desires have ceased"[1] *Commentary* :—*Prattásu*] married. *Ramanam*] sexual enjoyment. The meaning is "when his desire for sexual enjoyment has ceased"; [desires] regarding wealth. Sankha states the third case thus :— "When the father is unwilling, partition may take place if he be old, perverse in mind and afflicted with disease."[2] *Commentary* :—Perverse in mind] addicted to vice. Yajnavalkya states the fourth case thus :—"After the parents let the sons divide the wealth and the debts equally."[3] *Commentary* :—After parents] after the death of the father and mother. The wealth, &c.,] The meaning is that they shall divide the paternal wealth and debts equally.

The same author states a distinction when the sons themselves make a partition after the father's death or during his life when he is subject to the taint of degradation, &c. "The uninitiated must be initiated by those already initiated, as also the sisters by giving them a fourth part of their own shares."[4] The meaning is that partition should after initiating uninitiated brothers and sisters, *i.e.*, performing their sacraments up to marriage inclusive. The meaning of "As also, &c.," is that the unmarried sisters should be married and should be given a fourth share of their own respective shares. By their shares is meant "the shares which the sons of the various castes would be entitled to. Under the subsequent text they shall have from three, two and one shares, etc." The following is the mode of division :—A Bramhin has one wife, a son and a daughter by her. Here the father's wealth should be divided into two shares, one of these shares should be divided into four parts. After giving the daughter a fourth part, the son shall take the rest. When there are two sons and one daughter, then, the father's wealth should be divided into three shares, one of these shares should be divided into four shares. Having given a fourth share to the daughter, the sons shall equally divide and take the rest. The same should be inferred when there are more than two sons and two daughters. If there be one son and two daughters, then the father's wealth should be divided into three

(1) Narada XIII, 3.
(2) II. Cole. Dig.
(3) Yajnavalkya II. 117.
(4) Ibid, II. 124.

shares. One of these shares should be divided into four parts. Having given each of the daughter a fourth part, the son shall take all the rest. This should be the rule of division adopted where there are sisters and brothers of the same caste unequal in number. The following rule should be applied where there are brothers and sisters of different castes equal or unequal in number. Thus when a Brahmin has wives of all the castes, Brahmin, &c, and his Brahmin, Kshatriya, Vaisya and Sudra wives have each a son and daughter and where the Brahmin has thus eight children, four male and four female then the issue of the Brahmini wife take eight shares, the issue of the Kshatriya wife six shares, the issue of the Vaisya wife four shares and the issue of the Sudra two shares. Thus having divided the whole wealth into twenty shares the daughter of the Brahmini should be given a fourth part of the four shares which represent the share of a son of her caste. To the daughter of the Kshatriya should be given a fourth part of the three shares which represent the share of a son of her caste. To the daughter of the Vaisya should be given a fourth part of the two shares which represent the share of a son of her caste. To the daughter of the Sudra wife should be given a fourth part of the one share which represents the share of a son of her caste. Having thus given, the sons of the Brahmini, the Kshatriya, the Vaisya and the Sudra wives should put together the rest of the wealth and divide and take it in four, three, two and one shares respectively. Where the brothers and sisters are unequal in number, then having divided the whole wealth into as many shares as there are brothers and sisters according to the rule "they shall take four, three, two and one shares respectively," the sisters should be given a fourth part of the share due to a son of her caste. Having so given, the remaining shares should be put together and should be divided among the sons in four, three; two and one shares respectively. The rule should thus be understood. Some, however, think thus: Having given the maiden daughters a fourth share according to the rule above laid down, their marriage must be performed with such wealth alone. It is not that they should be married out of the common wealth and that they should be, subsequently, given a fourth share. This opinion should be rejected as Medhatithi, the author of the Mitakshara, and others do not incline to that view. Or the question may be [determined with reference to the practice

in different countries. The periods of partition and what arose in that connexion, these both have been described. Now primary and secondary sons are described in order to show the rule of succession to the heritage.

On this point Yajnavalkya says:—"The legitimate son (*aurasa*) is one procreated on the lawful wedded wife. Equal to him is the son of an appointed daughter; the son of the wife is one begotten on wife by a kinsman of her husband or by some other. One secretly produced in the house is the son of hidden origin. A damsel's child is one born of an unmarried woman. He is considered as son of his maternal grandsire. A child begotton on a woman whose first marriage has not been consummated or on one who had been deflowered before marriage is called the son of a twice married woman. He whom his father or his mother give for adoption shall be considered as a son given. A son bought is one who was sold by his father and mother. A son made is one adopted by the man himself. One who gives himself is self given. A child accepted while yet in the womb is one secured with a bride. He who is taken for adoption having been forsaken by his parents is a deserted son. Of these the next in order in the absence of all the preceding is heir and giver of the pinda. This rule is stated in respect of sons equal in caste."[1]

Commentary:—The virtuous wife is one belonging to the same caste and married in legal form. The son born of her is *aurasa* He is primary. So also the son begotten on a wife of the same caste married in the Asura and the succeding forms, so the Murdhavasikta, Ambastha, and the Parasava the same as Nishada, sons begotten by a Bramhin on his wives in the order of castes, such as the Kshatriya, &c, the Mahishya and Ugra, sons begotten by a Kshatriya on the wives of the Vaisya and Sudra castes, the Karana son begotten by a Vaisya on a Sudra wife, all these are certainly *Aurasas*. *Putrikasutah*] Either the appointed daughter herself regarded as a son or the son of the appointed daughter. Either way the *Putrikasuta* is equal to him *i.e.*, the *Aurasa*. So the *Dvyamushyayana* (the son of two fathers) is the *aurasa* son of his procreator. The *Kshetraja* (son of the wife) is one begotten on the wife under the Niyoga rules by one of the same caste or *gotra*

(1) Yajnavalkya, II, 128—3.

sapinda or her husband's younger brother. The *Gudhaja* or son of hidden origin is one begotten in secret on a woman by some unascertained person of the same caste in her husband's house. By some unascertained person] This is from the stand point of the husband, not of the wife. The knowledge of the person belonging to the same caste is possible because the fact of it is known through the wife. Where owing to sexual intercourse with a man under compulsion or in secret even she does not know his caste, the son born of it bears only the name of *Gudhaja* but does not attain the status of the *Gudhaja* previously described. The son begotten on a maiden by a man of the same caste is called the damsel's son. He is the son of his maternal grandsire if she is unmarried and stays under her father's roof. If she has been married, the son then belongs to her husband.

Accordingly, Manu says :—"That son whom a maiden in her father's home begets in secret, let one call him the damsel's son by name, belonging to the damsel's husband."[1] *Commentary* :— Because the word *husband* is used, it should be understood that the son belongs to the husband if she has been married and to the maternal grandsire otherwise. The twice married woman is of two sorts—the virgin and the deflowered. One begotten on her by a man of the same caste is called *Punarbhava*. The *Dattaka* is also of the same caste; for Manu says: "He whom his father or mother gives during distress and with water, being of the same caste and affectionately disposed should be known as the son given."[2] *Sadrisam*] of the same caste. Mother has power to give only in distress when the husband is dead or is absent. Similarly, the father has power only in distress when the mother is dead or is subject to lunacy, &c. Or, both have power only when acting together. As the expression "in distress" is used, it is inferred that in the absence of distress, the son should not be given. If given in the absence of distress, sin attaches to the giver and not to the receiver.

An only son should not be given or taken. So Vasishtha says "But let not one give or take an only son."[3]

Similarly, the eldest son also should not be given.

(1) Manu, IX, 170. (2) Ibid., IX, 168.
(3) Vasishtha, XV, 3.

Vasishtha thus lays down the manner of taking a son: "One desirous to adopt a son, should convene his kindred, inform the king, perform the *homa* with *vyahritis,* in the middle of his dwelling, and shall only take one whose relatives are not far off and who is nearest among his relatives."[1] *Nivesanasya*] of his dwelling. The expression "whose relatives are not far off" is used for the purpose of prohibiting the taking of one who is very much removed by country and language. This rule should be applied *mutatis mutandis* to the son bought, to the son self-given and to the son made. The son bought is one of the same caste not being an only or the eldest son sold in distress by his father and mother together as previously laid down or by either of them. As for what has been stated by Manu: "He is the son bought whether equal or unequal,"[2] that is intended to mean equal or unequal by good qualities and not by caste, such as Brahmin, &c. The son made is one who is taken for a son by one anxious to have a son, he being devoid of parents and induced to become his son by show of wealth, &c. The son self-given is one who being either devoid of parents or forsaken by them seeks one and exclaims: "I shall become thy son." Here also he must be of the same caste. The son received with a pregnant bride is one born of the pregnancy of a woman married while pregnant, if the pregnancy was due to a male of the same caste. One who being forsaken by his father and mother is taken for a son by a person of the same caste is called a deserted son. Here the author shows the order of succession by the following portion of the text. "He is the giver of the *pinda* and taker of the wealth, &c." The author next says that this applies to sons of the same caste (with the father) by the following portion of the text: "This rule has been stated by me in respect of sons of equal caste." Though the sons of the wife, &c., may have been begotten by males of a superior caste still they retain their appropriate name; but do not attain to the rank of sons begotten by males of the same caste because the clause "This has been stated in respect of sons of equal caste" has a restrictive force. If begotten by men of inferior caste it should be distinctly understood that they are contemptible, being born in the inverse order (*Pratilomaja*). The damsel's son, the son of concealed birth, the son received with the pregnant bride, and the son of the twice-married woman are said to be of the same caste

(1) Ibid, XV, 6. (2) Manu, IX, 174.

through their procreator's and not by their own nature; for, they being sons of unchaste wife and widow are themselves excluded from the pale of caste.

If after the making of an appointed daughter an *aurasa* son is born, then Manu states a distinction. "If subsequent to the making of an appointed daughter a son is born, division in that case shall be equal; for women have no right of primogeniture."[1]

Katyayana says: "If an *aurasa* is born the other sons take a fourth share if of the same caste; but if of different caste they get only food and raiment."[2] Of equal caste] the son of the wife, the adopted son, the son bought, the son made, the son self-given, and the deserted son. Of different caste] the damsel's son, the son of concealed birth, the son received with the pregnant bride and the son of the twice-married woman.

As for the text of Vishnu: "But the damsel's son, the son of concealed birth, the son received with the pregnant bride, the son of the twice-married woman, all these are contemptible and do never obtain share of the father's wealth,"[3] that is intended to prohibit the taking of a fourth share by these where there is an *aurasa* son. In default of the *aurasa* son, &c., even the damsel's son, &c., certainly take the whole of the father's wealth according to the text. "The next in order in default of the preceding." This is Vijnanesvara's view. This order of succession laid down by us here is also laid down in the Dayabhaga chapter of the Subodhini a commentary on Vijnanesvara's work.

Regarding one who being entitled to a share does not wish to take it either from lack of avarice, &c., or from ability to earn for himself, Yajnavalkya says: "One who is able (to earn) and not desirous (for partition) should be separated by giving him some trifle."[4] Something however valueless should be given and partition should be made; and this is enjoined in order that his sons, &c., may not subsequently claim a partition.

In respect of the *Dvyamushyayana* (the son of two fathers) the author lays down a special rule. "The son begotten under the Niyoga rules by a sonless man on the wife of another is legally

(1) Ibid, IX, 134.
(2) II, Cole. Dig.
(3) Not found.
(4) Yajnavalkya II, 116.

the taker of the wealth of both and the giver of the *pinda*."[1] When the owner of the seed being himself sonless enters at the time of supplying the seed into the special contract 'the son born hereof shall belong to us both,'—it is only then that the son takes the wealth of the owners of both the seed and the soil. In the absence of a special contract, he takes the wealth only of the owner of the soil.

Regarding the son born subsequently to partition, Manu says:—"But the son born after partition takes only the paternal wealth."[2] The word *pitryam* is an *ekasesha* compound and means '*belonging to the father and the mother*. Accordingly, it is also said:—"What is acquired by the father himself after division with his sons all that belongs to the son born after partition and the sons, born before it are declared powerless over such wealth."[3] It is also said: "Or let him divide equally with those who may have been re-united with him (father)."[4] The meaning is, that the son born subsequent to partition shall share equally with others who after partition were reunited with the father.

On the question how share should be allotted by the other brothers to the son born subsequent to partition of the mother or the brother's widow whose pregnancy was not manifest at the time of the partition, Yajnavalkya says: "His share should be allotted out of the visible wealth corrected for income and expenditure."[5] '*Tadvibhaga*'] his share. Here 'his' refers to the son born after partition in the manner previously stated. '*Drisyadva*' the particle '*va*' here is used for the purpose of emphasis and means, '*certainly*.' Of what visible wealth?] Of the visible wealth corrected for income and expenditure. Income is gain derived from agriculture, &c., in respect of their shares obtained at the partition. Expenditure is what is incurred of necessity to discharge the father's debts, to maintain the family, &c. Having added the share and income and subtracting from it the expenditure incurred, the brothers should each give out of their own wealth, portions in fair proportion, to the son born after partition so as to make his share equal to their own. This is the meaning. If the pregnancy of the mother or the brother's widow be manifest, partition should

(1) Anonymous.
(2) Manu, IX, 216.
(3) Brihaspati. YXX, 19.
(4) Manu, IX, 216.
(5) Yajnavalkya, II, 122.

be made after their confinement. For, Vasishtha says:—"Now partition among brothers to await till childless women beget sons."[1] The meaning is, that partition should be made after confinement of childless women whose pregnancy is manifest.

When ornaments, &c., are given by the father or the mother after partition to the divided son, the son born after partition should not prohibit it. Accordingly, the holy sage says: "Whatever is given to any of the sons by the parents becomes his exclusive wealth."[2] Whatever is given by the parents to any of the sons before partition also becomes his exclusive wealth by parity of reasoning. Hence, when anything is given to one, none other should prohibit it.

Next, partition among sons unequal in caste. Here Yajnavalkya says:—"The sons of a Brahmin in the order of castes shall take four, three, two and one shares; the sons of a Kshatriya, three, two, and one shares; the sons of a Vaisya two and one shares."[3] In the order of castes the sons of a Brahmin begotten on wives of Brahmin, Kshatriya, Vaisya and Sudra castes, respectively, shall take four, three, two and one shares. The son of the Brahmini wife takes four times the share of a Sudra; The son of the Kshatriya wife takes three shares because he is inferior to the Brahmini's son by a fourth; the son of a Vaisya wife takes two shares as he is inferior to a Brahmini's son by a half; the son of a Sudra wife takes a share. The sons of a Kshatriya begotten on wives of the Kshatriya, Vaisya and Sudra castes, respectively, take three, two and one shares. The son of a Kshatriya begotten on a Kshatriya wife takes three shares because he is a degree inferior to the son begotten by a Brahmin on a Brahmini wife; the son of a Kshatriya begotten on a Vaisya wife two; and the son begotten on a Sudra wife takes one. *Vidjas*]. sons begotten by a Vaisya on his wives of the Vaisya and Sudra caste. The plural number in *Vidjas* has reference to the possible plurality of the sons and not to the plurality of the husbands of the wife. The son of a Vaisya begotten on a Vaisya wife takes two shares, because he is inferior to the son of a Brahmin begotten on a Brahmini wife by a half, and the son begotten by a Vaisya on a Sudra wife takes one share. In this manner, the

(6) Vasishtha, XVII, 41. (7) Not found.
(8) Yajnavalkya, II, 125.

rule should be applied whether the sons be equal or unequal in number.

The sons of a Brahmin begotten on his wives of the Kshatriya and other castes shall not take land acquired by acceptance of gift. So the Sastra says :—" Land acquired by acceptance of gift shall not be given to the sons of the wife of Kshatriya and other castes. Even if the father give it to them, the son of the Brahmini may resume it when he is dead."[1] As the word "Acceptance of gift" (Pratigraha) is used they take land acquired by purchase, &c. So " the son begotten by a twice-born on a Sudra wife does not take a share in land." The meaning is, that the son of a Sudra wife begotten by any of the twice-born do not take shares in land acquired by acceptance of gift, purchase, &c. As for this other text which prohibits the giving of any share to the son by a Sudra wife, viz.: " The son by a Sudra wife does not share in the wealth of the Brahmin, Kshatriya and Vaisya. Whatever his father may give him, that alone shall be his wealth." This is intended to lay down that no share shall be allotted at a partition to the son by a Sudra wife where his father, during his lifetime, had given him something. But where nothing had been given by the father, his right to share certainly subsists.

Yajnavalkya lays down a special rule in the case of the son begotten by a Sudra on a female slave. " Even the son begotten by a Sudra on a female slave shall obtain a share at the father's choice. But when the father is dead let his brothers make him the partaker of half a share. If brotherless he takes the whole in default of the daughter's son."[2] *Kam-atah*] at the father's choice, he may take a share. That is, he has a share if the father give him one. The drift is, that the sons by married wives shall give him a half of their share. If brotherless, *i.e.*, having no brother born of a married wife, he shall take the whole paternal wealth if there are no daughters of married wives or their sons. If there be, the son of the female slave gets only a half share. Since the Sudra is specially named the conclusion is that sons begotten by a twice-born on the female slave do not in any manner obtain shares but are entitled only to food and raiment.

S. SITARAMA SASTRI.

(1) Brihaspati, XXV, 30. (2) Yajnavalkya, II, 133 and 134.

NOTES OF INDIAN CASES.

Ittappan v. Parangodan Nayar, I. L. R., 21 M., 291. The defendant had a contract of renewal of a mortgage and continued in possession having paid the renewal fee. But no fresh demise had been executed. Upon the jenmi suing to eject, the Court dismissed the plaintiff's claim. Without a registered instrument defendant could not acquire the mortgage right. But he had a contract entitling him to the document, and although the legal estate had not passed to the defendant in the absence of a document, he was entitled in equity to resist the plaintiff's claim for possession. It appears to us that the dictum in *Papireddi* v. *Narasareddi* I.L.R., 16 M., 464, has been rightly dissented from.

Balwant Singh v. Rani Kishori, I.L.R., 20 A. 267. Our readers may remember the question that was raised before the Allahabad High Court of the validity of the appointment of Mr. Justice *Burkitt.* He was appointed by the Local Government whose power is restricted to provisional appointments *upon* the happening of a vacancy. The appointment in his case was made many years after the vacancy had occurred. The Allahabad Court was of opinion that the appointment could not fall within the wording of the Letters Patent, but they refused to consider it invalid, because there might be some authority unknown to the Judges which might render it valid. The Privy Council have now expressed their opinion that there is no limit of time within which the Local Government was bound to make the appointment. Whether this interpretation is justified by the language or not, it is undoubtedly a more satisfactory conclusion than that of the Allahabad High Court. Though the decision in *Queen-Empress* v. *Gunga Ram* I. L. R., 16 A. 136 was referred to in the course of the argument, the judgment of the Judicial Committee makes no reference to it.

Kamrak v. Sundar Nath, I.L.R., 20 A. 299. There can be no doubt that upon an application to sue *in formâ pauperis,* the Court is competent to determine whether the allegations made show a right to sue. Clause *c.* of S. 407 no doubt adds "in such Court." We do not think stress should be laid on those words. It is not competent, however, to the Court to enquire whether the allegations are true. Such an enquiry would involve the determination of the suit itself upon the merits. The cases of *Vijendra Tirtha Sami* v. *Sudhindra Tirtha Sami,* I.L.R., 19 M., 197 and *Chattarpal Singh* v. *Raja Ram, Ib.* 7 A., 661, entirely support the conclusion of the Court. In the case under notice some vague allegations of a claim under law and custom were made

which, upon the examination of the party, turned out to be insufficient to constitute a cause of action.

Chunni Lal v. Harnam Das, I. L. R., 20 A., 302. An application for sale of property in execution of a mortgage decree is held to fall within Art. 179 of the Limitation Act. The Calcutta Court has held the view, see *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar*, I.L.R., 16 C., 246 and *Ajudhia Pershad* v. *Baldeo Singh* I.L.R., 21 C., 818, that it is competent to the decree-holder to apply for an order absolute at any time. This would seem to be the proper view under the Transfer of Property Act. If it is regarded as an application for execution, the view ennunciated in the case under notice, following *Oudh Behari* v. *Nageshar* 13 A., 278, would appear to be correct. In the absence of any provision of the Transfer of Property Act, there can be no doubt as to what view should be taken, as in the case of every other conditional decree the application would be one for execution. We do not think this has been altered by the language of the Act. The Act, no doubt, requires that an order absolute should be obtained; but there is nothing in the Act to prevent its being regarded as in execution of the decree. See also *Elayadath* v. *Krishna* I.L.R, 13 M., 267.

Daya Kishan v. Nanhi Begam, I. L, R., 21 A., 304. There is no doubt, as laid down in this case, that an application under S. 206 to bring the decree into conformity with the judgment is not one to take a step in aid of execution and, therefore, cannot extend the period of limitation. But if execution is applied for as regards that portion which is amended, we should then imagine that the time would run from the date of the amendment, that is to say, time runs from the date when the right to apply accrues. We recognize a difficulty in applying Art. 178 to cases of execution, but no other course is apparently possible. See *Muhammad Suleman Khan* v. *Muhammad Yar Khan* I.L.R., 17 A., 39.

Sha Muhammad Khan v. Hanwant Singh, I. L. R., 21 A., 311. In the case of partition suits, there are generally two decrees, one the preliminary decree, and the other the final one. It has been held, and we think, rightly, that an application to determine the amount of mesne profits is not one in execution, but one which may be made at any time after the passing of the first decree directing the determination of the amount of mesne profits in execution. See *Dildar Hossein* v. *Mujeedunnisa* I. L. R., 4 C., 629 and *Puran Chand* v. *Roy Radha Kishen Ib.* 19 C., 132. On the analogy of these decisions it would seem to be right to hold as in *Dwarka Nath Misser* v. *Baimdra Nath Misser* I.L.R., 22 C., 425, that where a preliminary decree is passed declaring the shares of the respec-

tive parties, an application for 'delivery' after division by metes and bounds is not one for execution. An interlocutory decree for partition is no doubt final for the purposes of an appeal, see *Dulhin Golab Koer* v. *Radha Dulari Koer Ib.* 19 C., 463, but that finality does not preclude the application for division and delivery being regarded as one for the passing of a further decree. *Nasarat-ullah* v. *Mujib-ullah* I.L.R., 13 A., 309. See, however, *Jamsang Devabhai* v. *Goyabhai Kikabhai Ib.* 16 B., 408.

Haji Syed Muhammad *v.* Gulab Rai, I. L. R., 21 A. 345. It appears to us doubtful whether the decision in this case is correct. The facts of this case are somewhat peculiar. By a previous decree between the parties the defendant's right to build upon the land had been negatived. But in contravention of this direction the defendant built and the plaintiff objected and brought a suit for a mandatory injunction two years after the building was complete. There was no acquiescence in the case disentitling the plaintiff to the relief asked for. But the learned Judge, on the analogy of the case in *Benode Coomaree Dosse* v. *Soudamin ey Dosse*, I.L.R., 16 C., 252, which was a case of the erection of a building upon one's own land in violation of an easement of light and air, holds that the plaintiff was not entitled to the injunction as he came in late. It appears to us that the analogy is not sound.

In the Calcutta case there was an undoubted right to build, and the question merely was whether the building amounted to an interference with the easement. The principle upon which mandatory injunctions are granted in such cases being that the existence of the building is detrimental to the comfortable occupation of the dominant premises, inaction for a considerable period is taken to be evidence that removal of the building is not a necessary relief, but damages would be adequate compensation. But where there is no right to build at all, it appears to us that the analogy fails.

Thaku Prasad *v.* Gaya Sahu, I.L.R., 21 A. 349. A judgment-debtor made a lease of property against which there was a mortgage-decree for sale. Whether the provision of S. 52 of the Transfer of Property Act applied in terms or not, there can be no doubt that the alienation is void as against a decree-holder's rights under his decree. S. 276 of the Code provides against the validity of alienations of attached property and S. 52 against property which is the subject of a contentious proceeding. The same principle applies to the case under notice.

SUMMARY OF RECENT CASES.

Criminal Procedure Code (1882), *S.* 386—*Fine—Realization of fine by sale of property belonging to a person other than the convict—Suit by owner of the property sold against the Government—Liability of Government—Regulation No. XI of* 1882, *S.* 38—*Regulation III of* 1793, *S.* 1—*Act No. XVIII of* 1850, *S.* 1—*Statute* 21 *and* 22 *Vic., Chap. CVI, S.* 65—*Statute* 23 *and* 24 *Vic., Chap. XXXIV.*

The Secretary of State for India *v.* Sukhdeo.

A was sentenced, on conviction of an offence under the Indian Penal Code, to pay a fine. Proceedings under S. 386 of the Code of Criminal Procedure (1882) were taken to realize the fine inflicted on A, and certain movable property, supposed to belong to A, was sold for the sum of Rs. 5-15-6. The property thus sold really belonged to B, A's father, who thereupon filed a suit against the Secretary of State for India in Council, praying for the restoration of the said property, or for the recovery of Rs. 10, its alleged value.

Held by *Blair*, J.—That the order of the Magistrate for the sale of particular chattels, made under the circumstances of this case, was not a judicial proceeding within the meaning of Act No. X of 1882, and was not the proper subject of criminal revision; that the remedy of an aggrieved third party was by suit; that such a suit would not lie against the Magistrate, but could be maintained against the person in whose possession the goods were found; but that no such suit would lie against the Government, the Government not being primarily liable for a wrongful act done by an officer of the Government, not in obedience to its commands, but in the intended performance of the duties cast upon him by law, and no ratification of the act of the Magistrate in the present instance being proved, even if, under the circumstances, the Government could in law ratify the act so as to make itself responsible. *Bukhooree Singh* v. *The Government* (8 W. R., C. R., 207); *Kedernath Mookerjee* v. *Parbutty Peishkar* (2 W. R, C. R., 267), *The Queen* v. *Chumroo Roy* (7 W. R., Cr. R., 35), *In re Chunder Bhon Singh* (17 W. R., Cr. R., 10); *Queen-Empress* v. *Sheodihal Rai* (I. L. R., 6 A., 487); *Forester* v. *The Secretary of State for India in Council* (12 B. L. R., 120); *Raja Saligram* v. *The Secretary of State* (12 B. L. R., 167); *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (7 M. I. A., 476); *The Secretary of State for India in Council* v. *Hari Bhanji* (I. L. R., 5 M. 273); *Nicoll* v. *Glennie* (1 M., and S., 588); *Lewis* v. *Read* (13 M. and W. 834); *Tobin* v. *The Queen* (16 C. B., N. S., 310); and *Buron* v. *Denman*

(2 Ex., 167), referred to, *Nobin Chunder Dey* v. *The Secretary of State for India* (I. L. R., 1 C., 11); and the judgment of *Spankie*, J., in *Kishen Chand* v. *The Secretary of State for India in Council* (I. L. R., 3 A., 829), dissented from.

Held by *Aikman*, J. :—

(1) That the plaintiff had no remedy open to him in the Criminal Courts.

(2) That the action of the Magistrate in seizing and selling the plaintiff's goods was not an act of State, into the legality of, which Municipal Courts were precluded from inquiring.

(3) That although the Crown is not liable for the illegal acts of its servants and cannot be called on to pay compensation or damages for such acts, it can be held liable to make restitution, but only to the extent by which it has benefitted by the illegal acts.

(4) That in the case of property seized and sold under S. 88 or S. 386 of the Code of Criminal Procedure a claimant may proceed against the purchaser, but this does not prevent his proceeding against the Crown if he prefers to do so. *Bukhooree Singh* v. *The Government* (8 W. R., C. R., 207); *The Queen* v. *Chumroo Roy* (7 W. R., Cr, R., 35); *In re Chunder Bhon Singh* (17 W. R., Cr. R., 10); *Queen-Empress* v. *Sheodihal Rai* (I. L. R., 6 All., 487); *Queen-Empress* v. *Kandappa Goundan* (I. L. R., 20 M., 88); *Queen-Empress* v. *Gasper* (I. L. R., 22 C., 935); *The Secretary of State for India in Council* v. *Hari Bhanji* (I. L. R., 5 M., 273); *Musgrave* v. *Pulido* (49 L. J., P. C., 20); *Tobin* v. *The Queen* (16 C. B., N. S., 310); *Kishen Chand* v. *The Secretary of State for India in Council* (I. L. R., 3 All., 829); *The King* v. *The Lords Commissioners of the Treasury* (4 A. and E, 286); *Hettihewage Siman Appu* v. *The Queen's Advocate* (L. R., 9 App. Cas, 571); and *Feather* v. *The Queen* (35 L. J., Q. B., 200); referred to:—*The Allahabad Weekly Notes for* 1898 *p.* 173

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

Good Reading About Many Books selected by their authors *Third year*, by Fisher Unwin.

The Albany Law Journal for Oct. and Nov. (*in exchange*).
The Calcutta Weekly Notes for Oct. and Nov. (*in exchange*).
The Allahabad Weekly Notes for Oct. and Nov. (*in exchange*).
The Green Bag for Oct. and Nov. (*in exchange*).
The Canadian Law Times for Oct. and Nov. (*in exchange*).
The Canada Law Journal for Oct. and Nov. (*in exchange*).
The Educational Review for Oct. and Nov. (*in exchange*).
The Indian Journal of Education for Oct. and Nov. (*in exchange*).

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The High Court sitting list:—We are unable to realize what difficulty his Lordship *Sir Arthur Collins* feels in framing the list of Judges' sittings for more than the brief period of a week. We have more than once pointed out in our pages the trouble and expense that parties are put to, and the great annoyance the practitioners feel in not having sittings lists issued for a month or two months at the same time. Mr. Justice *Shephard*, as Officiating Chief Justice felt no such difficulty; and it was quite a relief to practitioners to have even the sittings of three weeks together let known to them, although even that period was not sufficiently long. With the return of *Sir Arthur Collins* from leave, we are reverting to the old state of things. We understand that representations have been made through the Registrar which have not been heeded. The matter may look very small to laymen. Those that are familiar with the Courts will have no difficulty in realizing the inconvenience. We would impress upon his Lordship the desirability of consulting the convenience of parties and practitioners a little more than he is at present in the habit of doing. For it seems to us the administration of justice does not consist in merely being able to make up a round number of cases disposed of, at the end of each year.

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Chief Justice Strachey:—The elevation of Justice *Strachey* to the Chief Justiceship of Allahabad cannot fail to be looked upon as the reward of political service, though he appears to possess learning and ability of a high order. That a man so young and such a junior in the service as a Judge should have been selected for a Chief Justiceship is not an

event in the ordinary course of things. The reported judgments of the learned Judge seem to us to show elaborate study and care in their preparation. He has not been sufficiently long on the Bench to enable us to pronounce upon the general soundness of his judicial deliverances. If report is true, he appears to have a quick grasp of facts and a ready knowledge of law. If he has got any tendency to dance to the tune of the Executive Government, he would be deficient in a quality which is more prized in a judge than all the learning and ability in the land—judicial independence. He has unfortunately marred his reputation by his one sided and undoubtedly prejudiced charge to the jury in the *Tilak trial.* We have always thought that the great mistake was that of Chief Justice *Farran* in having selected *Mr. Justice Strachey* to preside at the trial of that case. His antecedents as the son of *Sir John Strachey,* a thorough bureaucrat cannot lead one to expect much liberality of views or a sympathetic administration of justice. One so young, without the mellowing influence of age and experience should not have been selected to try a case in connection with which political feeling ran high and even men habitually cool-headed lost their wits. However, we hope, his charge in that case was only the aberration of a strong mind and that he will live long enough not merely to regret that incident of his career but to develop qualities of head and heart which may make him an ornament to the judiciary of the land.

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The Pittapore Case:—News has been received in India that the plaintiff's appeal to the Privy Council will be dismissed. This result was a foregone conclusion to many people although *Mr. Mayne,* Counsel for the appellant, appears to have entertained strong hopes of success. The decision in *Sartaj Kuari* v. *Deoraj Kuari* I. L. R., 10 A., 272 came upon us as a surprise and the last hope of that decision being upset so far at least as this Presidency is concerned, must now be given up for ever. There has been a whole host of decisions in this Presidency treating impartible Zemindaries as inalienable. At one stroke of the pen, in utter violation of the uniform consciousness of lawyers and laymen in Southern India, the Privy Council pronounced Zemindaries alienable at the whim or caprice of any reckless scape-grace. It was conceived that if that uniform course of authority and the ruinous dismemberment of estates were brought to the notice of the Judicial Committee, the decision in I. L. R. 10 A., might be limited to the provinces to which it wsa primarily applicable. But even that august tribunal has of late years fallen short of the expectations of lawyers in this country. One thing, of course,

in connection with the conduct of the case in the Court of First Instance, we cannot but regret. We have always wondered why the plaintiff's advisers failed to put forward a case of territorial custom. If there ever was a case in this Presidency in which money was spent like water, it was this. All the resources of wealth and social position and talent were available to substantiate a case of territorial custom. It would have been a matter of no difficulty to collect hundreds of instances in which the parties and the Courts had acted upon the view that impartible Zemindaries were inalienable. The case of family custom that was set up was by no means easy to establish for lack of instances; and possibly the only case which might have succeeded in stemming the tide of ruin consequent upon the decision of the Privy Council in I. L. R. 10 A., has ended without an arm having been lifted in that attempt. Constituted as that tribunal was, there was little prospect of a departure from the law laid down in that case in the absence of the only contention that might have wrung even from an unwilling tribunal a reversal of the law. As matters stand, the only hope for those that have the interest of Zemindaries at heart is to attempt to move the Legislature. It is a very slow-moving machine except for Government measures of taxation. If such a decision as the one in I. L. R. 10 A., had been passed with reference to England, it would have been upset almost the very next day as the decision in *Derry* v. *Peek* was by the action of the Legislature.

Facetiæ.

Custom House Officer: "Open your trunk. Have you anything but personal property?"

Distinguished Lawyer: "What do you call personal property?"

"Don't you know what personal property is?"

"Well, there's no real estate in it.":—*The Green Bag.*

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That canny Scott had a very keen sense of the fitness of things, who, when asked if he had ever been in a court of justice, replied, "No, but I've been before the Judge.":—*The Green Bag.*

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A farmer forwarded a letter to a town inscribed, "To any respectable attorney." The postmaster returned it, indorsed, "None here.":—*The Green Bag.*

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Young Lawyer: "I spent nearly an hour yesterday trying to convince that client of mine he was innocent."

Old Lawyer: "Oh, well, never mind; you'll probably be able to convince the Judge he's guilty in half the time".:—*The Green Bag.*

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The Husband Seducer.—The influential Supreme Court of Pennsylvania has now joined the noble army of Courts which hold that a wife may maintain an action against the seducer or enticer away of her husband, be the offender female or male, *Gernerd* v. *Gernerd*, 185 Pa. St. 549; 40 L. R. A. 549. The defendant was the husband's father. The Court says:—

"The right of a husband to maintain an action against one who has wrongfully induced his wife to separate from him seems not to have been doubted since the case of *Winsmore* v. *Greenback* (decided in 1745) Willes' Rep. 577. The right of a wife to maintain an action for the same cause has been denied because of the common-law unity of husband and wife, and of her want of property in his society and assistance. There was certainly an inconsistency in permitting a recovery when the husband was a necessary party to the action, and she had no separate legal existence or interest, and the damages recovered would belong to him, but the gist of the action is the same in either case. There is no substantial difference in the right which each has to the society, companionship and aid of the other, and the injury is the same whether it affects the husband or the wife. Where the wife has been freed from her common law disabilities, and may sue in her own name and right for torts done to her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her. Generally, this right has been recognised and sustained in jurisdictions where she has the capacity to sue, notably in the cases of *Bennett* v. *Bennett*, 116 N. Y. 584, 6 L. R. A. 553; *Foot* v. *Card*, 58 Conn. 4, 6, L. R. A. 829; *Seaver* v. *Adams* 66 N. H. 142; *Westlake* v. *Westlake*, 34 Ohio St. 621, 32 Ann. Rep. 397; *Haynes* v. *Nowlin*, 129 Ind. 581,14 L. R. A. 787; *Warren* v. *Warren*, 89 Mch. 123,14 L. R. A. 545; *Bassett* v. *Bassett* 20, Ill. App. 543; *Price* v. *Price*, 81, Iowa; 693, 29 L. R. A. 150; *Clow* v. *Chapman*, 1125 Mo. 101, 26 L. R. A. 412; *Mehrhoff* v. *Mehrhoff*, 26, Fed. Rep. 14. The New York and Indiana cases cited overrule the earlier cases in those States in which a different conclusion has been reached. The only decisions in which we find the right denied are *Duffies* v. *Duffies*, 76 Wis. 374, 8 L. R. A. 420; and *Doe* v. *Roe*, 82 M. 503, 8 L. R. A. 833.

To the majority may be added *Williams* v. *Williams*, 20 Colo., 51 and *Hodgkinson* v. *Hodgkinson*, 43 Neb. 269, 27 L. R. A. 120 46 Am. St. Rep. 468; and to the minority: *Krossein* v. *Krossein*, 60, Minn, 372; 27 L. R. A. 685.:—*The Green Bag*.

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One of the stories told by Judge Parry who has a keen sense of humour, is says *The Daily News*, of a Jewish woman who was summoned before him for the non-payment, of a week's rent. 'Why don't you pay the money?' he asked her. 'Last Friday week when I was cooking a rabbit——' she began. 'My good woman,' interrupted the Judge, 'never mind the rabbit, but tell me why you didn't you pay the rent. '? 'I am telling you,' retorted the woman, 'if you will only let me. Last Friday week as I was cooking a rabbit, soot fell down and spoiled the rabbit, and do you think that I was going to pay rent for that week?' He tells another story of two Jewish litigants, one of whom offered to bet twenty pounds he was right. Judge Parry turned to the other litigant and asked if he was prepared to make a similar bet, but he replied sadly that he had no money. Later on, however, finding the case going against him, and thinking to strengthen his cause, he cried excitedly 'I will bet ten pounds of my father's attorney."—*The English Law Journal.*

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Mr. Justice Phillimore on facilities to dissolve marriage:—Upon taking his seat in Court on Wednesday morning, the 24th of August 1898, Mr. Justice Phillimore said:—'I understand that of late years it has been considered that those who wish to have their marriages dissolved cannot be expected to wait until after the long vacation, and the duty of making the decrees absolute is imposed upon the Vacation Judge. I was not consulted about this, but, on the whole, I have come to the conclusion that it is my duty to register these decrees. But I cannot take this step without, as a Christian man, saying how sorry I am on social, moral and religious grounds that these facilities should be given to persons to dissolve the marriages they have contracted. But that which the State in its wisdom or unwisdom, has decreed must be carried out by the officers of the law, and as I neither make nor unmake marriages, except as a civil officer, for that purpose the decrees *nisi* must be made absolute.—*The English Law Journal.*

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Gift—Delivery—What Constitutes.—In *Liebe* v. *Battman*, decided by the Supreme Court of Oregon in August, 1898 (54 Pac. R, 179), it

appeared that one about to commit suicide indorsed securities and sealed them in an envelope directed to a friend, with whom he was living, and laid it on a table leaving, a note to the friend containing directions as to the delivery of another letter and inclosure. The two slept in opposite parts of the house, and the friend reached the *felo de se* shortly after the shooting, but the latter became unconscious, and died without making further reference to the gift. It was held that there was no delivery, and this though the donee picked up the envelope during the lifetime of the deceased, where he delivered it to another, and did not open it until after the death.

The Court said:

The transaction is not supported by any valuable consideration, nor does anybody pretend that it is; so that, if there is no gift, Schutz's title must fail. Nor can it make any material difference what may be the quality of the gift, whether *inter vivos* or *causa mortis*, as the essential elements which go to establish it in either case are the same, in so far as the pivotal facts give caste to the transaction. There must be an intention in the donor to give, and a delivery, to pass the title. If *causa mortis*, these things must have been done under the apprehension of death from some present disease or some impending peril, but it is revocable, and becomes void by recovery, escape from such peril, or the death of the donee before the donor (*Ridden* v. *Thrall*, 125 N. Y. 572, 579, 26 N. E. 627). We need only to consider the intention and the alleged delivery. That there was an intent to give we think is perfectly manifest from the evidence adduced. The inclosing of the indorsed promissory note in a sealed envelope, addressed to Schutz, together with the few lines written him touching the envelope addressed to Mrs. Vierea, indicates so strongly that such was the fact as to become insusceptible of serious dispute. It was held in *Caldwell* v. *Wilson* (2 Speer, 75) that "delivery (in case of gift) is a transfer of possession, either by actual tradition from hand to hand, or by an expression of the donor's willingness that the donee should take when the chattel was present, and in a situation to be taken by either party." This implies, as the facts of the case warrant, that the donor and donee shall also be mutually present. *Andrews*, J., in *Beaver* v. *Beaver* (117 N. Y. 421, 428, 22 N. E. 940, 941), says: "The delivery may be symbolical or actual; that is, by actually transferring the manual custody of the chattel to the donee, or giving to him the symbol which represents possession. In case of bonds, notes or choses in action the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention." Many authorities concur in holding that a declaration

of gift in writing, without a delivery of the chattel, is ineffectual to transfer title, because, not being founded upon a valuable consideration, the supposed contract is *nudum pactum* and may be revoked at the will of the donor. And these, we are impressed, preponderate in weight of authority towards the establishment of the doctrine (see *Young* v. *Young*, 80 N. Y. 422; *Beaver* v. *Beaver*, *supra*; *In re Crawford* [N. Y. App.], 21 N. E. 692; *Connor* v. *Trawick's Adm'r.*, 79 Am. Dec. 58; *Wadd* v. *Hazelton* [N. Y. App.] 32 N. E 143).

There must be a parting with the dominion over the subject-matter of the pretended gift, with a present design that the title shall pass out of the donor to the donee, and this so fully and completely, to all intents and purposes, that if the donor again resumes control over it without the consent of the donee, he becomes a trespasser, for which he incurs a liability over to the donee except after revocation of a gift *causa mortis*. And so essential is delivery as a factor in the transaction that it is said: "Intention cannot supply it; words cannot supply it; actions cannot supply it. It is an indispensable requisite, without which the gift fails, regardless of the consequences." (Thornt. Gifts, § 131; see also *McCord's Adm'r* v. *McCord*, 77 Mo. 166; *Smith* v. *Ferguson*, 90 Ind, 229; *Hatch* v. *Atkinson*, 56 Me. 324; *Wilcox* v. *Matteson*, 53 Wis. 23, 9 N. W. 814; *Board of Sup'rs* v. *Auditor-General* 68 Mich. 659, 665, 36 N. W. 794; *Gano* v. *Fisk*, 43 Ohio St. 462, 3 N. E, 532.) The reason for the rule requiring delivery is obvious, and is founded upon "grounds of public policy and convenience, and to prevent mistake and imposition." (*Noble* v. *Smith*, 2 Johns. 52.)

Measured by the requirements of law, there was no delivery of the note to Schutz, nor does the fact that the note was indorsed dispense with its necessity. Such an indorsement, without considerarion, could not have stronger force or operation than a parol gift or by writing not under seal. Whatever might have been Closter's intention in writing his name on the back of the note, he could revoke the gift before delivery simply by retaining the note, and Schutz could not assert title thereto until something else had been done to complete the transaction. It cannot be said that Closter ever parted with his dominion. If so, when did it occur? Assuredly not before he made the attempt upon his life, for Schutz was not present to receive it. Placing the note upon his table in the sealed envelope addressed to Schutz was not a relinquishment of possession, because it remained with him and under his complete and absolute control. He could, at any instant, while conscious and in his right mind, have bestowed it upon any other person, at his

liking, and Schutz could not have prevented, nor would it have been an invasion of any rights acquired by reason of the indorsement and ensealment within the addressed envelope. And there could have been none after the shooting, for the note was not taken from the table nor mentioned by the deceased. The case can be no stronger than if the sealed envelope had been found among his other effects, for it was upon his table and within a room occupied solely by him. It was his intention, no doubt, that Schutz should find and appropriate it, but the right to make an appropriation did not accrue within the lifetime of Closter, and Schutz cannot now claim the property as against Closter's personal representative :—*The Albany Law Journal.*

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Right of the proprietor of a hotel to allow his guests to use his telephone.—This question recently came before Associate Judge Cox, sitting in the Supreme Court of the District of Columbia, on an application to make an injunction perpetual. It appeared that the plaintiff, Danenhauer, was the proprietor of the Hotel Fredonia in Washington. As such he was a subscriber of the Chesapeake and Potomac Telephone Company. The Company placed one of its instruments in the hotel. Danenhauer permitted patrons of the hotel to use the telephone free of charge. The Company sought to prohibit him from allowing his boarders to use the 'phone, under threat to remove the instrument. Danenhauer told the Company that they could not remove the 'phone The Company started to do so, and Danenhauer obtained a temporary injunction restraining the Company from removing the' phone or interfering with his service.

Justice Cox's decision was rendered after the Court had heard arguments for and against the plaintiff's request to make the injunction permanent. It makes the injunction permanent, but imposes certain requirments upon the plaintiff. In the order continuing the injunction it is required that the telephone must be used strictly for hotel business and for the private business of the proprietor. It stipulates that Danenhauer shall not allow the telephone to be used for other purposes than those mentioned.

"It may be used," the order states, "for the benefit and accommodation of boarders, such as sending for a wagon to call for baggage, but it may not be used by them for other purposes, such as calling for stock reports or the ordering of theatre tickets."

The order further states :—

The Telephone Company is obliged to maintain a special plant, and is entitled to charge for every message sent. All that the law requires is that

the Company shall not discriminate between its patrons, but must serve all persons on the same terms. The explicit terms of the contract, made between the parties in 1896, are that the telephone be for the subscriber's use only, and on a breach of the terms the contract may be violated.

When the subscriber allows others to use his telephone it is an abuse of the time of the telephone operator. It is also an infringement on the rights of the Bell Telephone Company, which receives a royalty from the defendant. Furthermore, it is an infringement of the rights of other subscribers. It is very annoying for a subscriber to call for a certain number and be told that the connection he wants is busy, that being due to the fact that a non-subcriber is using, free of charge the telephone with which connection is desired.

Is the hotel guest entitled to the use of the telephone in the hotel, when no one is entitled to the use of the telegraph if the Telegraph Company has an instrument in the hotel. The guest does not have his telegrams sent free of charge, nor does he secure the service of messengers and the use of carriages without pay. Why should he be allowed to use the telephone without paying for its use?:—*The American Law Review.*

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An English view of the American method of treating crime.—A report on the treatment of crime in America has been submitted to the Home Secretary by Mr. E. Ruggles-Brise. He was invited by the American delegates at the Prison Congress of Paris in 1895 to visit the United States and study the detail of their penal system or systems. The report, a summary of which we take from the *Daily Telegraph*, shows that, on the whole, the greater leniency exhibited towards criminals in America brings out the notorious truth that public sentiment is far tenderer towards those who have been convicted by law than is the case in European countries. Doubtless this accounts, as Mr. Ruggles-Brise suggests, for what the critics have often stigmatized as "the vagaries" of the system.

The general feature common to all the States is that while petty offenders and prisoners awaiting trial are under the care and control of the local authority representing the counties and the cities, persons convicted of serious crime are under the control of the State, and committed either to State prisons or State reformatories. It is to the latter that Mr. Ruggles-Brise directs his attention, and summarizes the results as follows:—

"(*a*) There is no progressive stage system as in England, whereby a prisoner advances by stages or classes from the lowest to the highest, according to his industry and conduct, receiving as he advances in-

creased privileges in the way of letters, visits and gratuity. There is a system of 'grades'—every convict on reception enters the second or intermediate grade, and is liable, in the case of misconduct, to be degraded to the first or lowest, or is able by good conduct, extending over six or twelve months, to be raised to the third or highest. The distinction in some prisons is maintained by a variety of clothing, or perhaps of diet—in others the distinction is more nominal than real.

"(b) In spite of the labour laws these prisons are still for the most part vast factories, conducted under what is known as the 'public account' system or the 'piece price' sytem. Under the former the State manufactures and sells in the open market in the same way as a private employer of labour. Under the latter a contractor supplies the material and machinery and pays so much for the manufactured article. Machinery of the most expensive and modern kind is everywhere in use; and, indeed, to such an extent is trade pursued that at one prison—Columbus—the trade-profits more than paid for the whole cost of the institution, some 280,000 dollars, or £ 56,000 a year.

"(c) Discipline during the hours of labour is, on the whole, well maintained, though with what in England would be considered very inadequate supervision, but the warders all carry firearms, the moral effect of which dispenses with a larger staff.

"(d) After the day's work is over, about half-past four, the men are taken to their cells, and it is during the period intervening between this time and bedtime, about half-past eight, that the relaxations of discipline, of which so much is heard in England, take place. The cells are all lighted with electric light (at Pittsburg tallow candles are allowed in the cells), tobacco-chewing and, in many prisons, smoking is allowed, also the daily and weekly papers. As a rule, a convict is allowed to furnish his cell with pictures, photographs, looking-glasses, etc. The solid cell door used in England is not used except in the punishment cells, iron gratings taking their place, thus rendering communication easy; and the arrangements for night patrol seemed to me to be inadequate, especially having regard to the fact that in most prisons, owing to the insufficient cell accommodation, what is known as 'doubling up,' or two in a cell, is a common practice.

"I visited one large prison late in the evening and nothing could exceed the quiet and orderliness of the place, but at this prison a safety-valve is found for the emotional energies of prisoners by permission being given between six and seven to any convict to exercise himself on any musical instrument that he either knows or may be

ambitious to learn. The discord that ensues, if ungrateful to the musical ear, is alleged to be instrumental towards securing a desire for repose when the bell for cease music is sounded, and certainly when I visited the prison at 10 P.M. you could hear a pin drop, though there were over 1,200 convicts in one long range of cells."

On the question of the reformatory system—which has often been misunderstood in England—there are some interesting remarks. What, in the first place, is the meaning of the system ?

"It is an attempt made at a considerable cost, and by the most ingeniously contrived methods, to deal with the problem of 'juvenile' adult criminality' by other than ordinary punitive or prison methods. It may require a considerable effort to throw oneself into the mental attitude of so many Americans, who are prepared to reject in the case of a certain class of offenders the doctrine of the 'right to punish. One cannot fail to be struck by the relation existing between the ideas of a large school of American penologists and the social doctrines of the French revolutionary period, which we know historically have had a deep influence on American opinion. The particular doctrine is found in the phrase—" La société prépare le crime—le coupable n'est que l'instrument qui l'exécute." In the light of this doctrine it is held that a youthful offender, or, rather, a juvenile adult (the age is fifteen to thirty at Elmira, fifteen to thirty-five at Concord), however serious his crime, is more sinned against than sinning. His crime is due to inherited defect, mental or physical, to vicious environment, to his not having had a chance. The duty of the State, having got this man into its clutches, is not to punish him—*i.e.*, by cellular immuration—for a definite period, and at the end of that time to let him loose upon society, probably no better than he was before, but to regenerate him, physically and mentally, to fit him to take his place among honest citizens, to prevent him from drifting into the ranks of habitual crime."

The methods of reform are physical development by gymnastic and military exercise, intellectual training, manual training from elementary processes to engraving, etching, and carving, and industrial training in masonry, carpentering, etc.

As to the value of the system, although there is much that is extravagant and perhaps ridiculous, the fundamental principle is one that must commend itself to thoughtful people interested in the study of criminal problems. It is, shortly, that, up to a certain age, every criminal is potentially a good citizen; that his lapse is presumably due either to physical degeneracy or bad social environment; that it is the

duty of the State, at least, to try to effect a cure, and not to class the offender offhand and without experiment with the adult professional criminal.

The remaining features of the American system, which Mr. Ruggles-Brise discusses, is the parol law and the practice of indeterminate sentences.

"The right of pardon, corresponding to the exercise of the prerogative of mercy, has always been inherent in the Governor of the State. There has also been a 'good-time' system corresponding to the English ticket-of-leave system, being a month for the first year, two months for the second, and so on, of sentence. This is equal to one-fourth of a five years' sentence and one-third of a ten years'. Of recent years the Legislatures of several States—notably, Ohio, Illinois, and Massachusetts—have introduced in addition the parol system, based on the indeterminate sentence. This indeterminate sentence is of two kinds—(*a*) Where the Judge fixes the minimum and maximum. (*b*) Where no definite sentence is stated in the commitment, it being provided only that the convict must serve the minimum prescribed by statute for the offence of which he is found guilty. This latter operates in Illinois. The former is the more general system. It is clearly explained in the New York law, though curiously, in this State the Courts rarely exercise the power, very few cases having been so dealt with since the law passed in 1890. The Statute runs thus: 'Whenever any male person over sixteen years of age shall be convicted of a felony which is punishable by imprisonment in a State prison, the Cou.t, instead of pronouncing a definite sentence of imprisonment, may pronounce an indeterminate sentence with the minimum and maximum only specified, but the minimum and maximum shall not be less or greater than that prescribed by statute for the offence.' The Parol Board consists of the Superintendent of State prisons, the Warden Chaplain and Physician. Parol may take place when there is 'reasonable possibility that the prisoner will live and remain at liberty without violating the law.'"

On this Mr. Ruggles-Brise comments:—

"In principle the 'parol' system must be condemned. There must be a tendency to flirt with crime if the decision of the Court can be set aside by a body of men, however competent, impartial, and able, who rely merely on the 'observation' of a prisoner while in prison, and upon that decide that A is a good man and can be safely discharged, B is a bad man and must be kept in custody. This uncertainty must

have also the bad disciplinary effect of unsettling the prisoner himself, and must be a fertile source of discontent, and though the system is alleged to afford a great stimulus to good conduct and industry, the right to earn 'good time' on a liberal scale ought to, and in fact does, if properly administered, sufficiently meet this end."

As to the probation system, according to which there exist in Massachusetts officers appointed to inquire into the character and antecedents of prisoners before trial and to report to the Judge, and after trial to take charge of persons whom the Judge may commit to their care, we find the following criticism:—

"Having been present in Court while cases were being dealt with and having conversed with various authorities, I came to the following conclusions with regard to the system: (1) It is no doubt of great advantage to the Judge to be placed in possession of facts concerning each individual case, which enable him, in many cases, to dispense with the necessity of imprisonment. (2) The tutelage exercised by the officers during probation is salutary and beneficial, and calculated to check at its outset a criminal career."

"*Contra.* (1) It is doubtful if public opinion in England would tolerate the preliminary 'inquisition' before trial, statements made by the prisoner being used by the officer of the Court for or against him as the case may be. (2) It is difficult to avoid rivalry and conflict between the police and probation officer, the functions of the latter being to a great extent police duties. (3) Owing to the strong feeling in the State against any breach of the liquor law, and to the enormous number of arrests under it, being three-fourths of the total arrests, the time of the officers is practically absorbed by investigation into cases of simple drunkenness—cases which would not come into Court at all in England, and the original intention of the system—viz.: that all criminal cases should be the subject of preliminary examination—is largely departed from, and the probation officer runs a risk of becoming a mere instrument in the hands of that section of the community which pursues with relentless severity anyone succumbing to the temptation of alcoholic excess. (4) The system is expensive and might become inquisitorial."—"*Law Times* (London)' :—*The American Law Review.*

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Life Insurance: Suicide—No recovery where the assured, being sane, commits suicide, although not so stipulated in policy.—In the case of *Ritter* v. *Mutual Life Ins. Co.*, 169. N. S. 139 the Supreme Court of the United States had before it (in addition to some questions of procedure)

the question whether intentional self-destruction by the assured, he being of sound mind, is in itself a defence to an action upon a life policy, although the policy, does not, in express words, declare that it shall be void in the event of self-destruction, when the assured is of sound mind. In point of fact, the application for the policy did contain a warranty on the part of the assured that he would not commit suicide within two years, but as a copy of this was not annexed to the policy, it was excluded from evidence, as required by the statute of Pennsylvania; so that the naked question was left as above stated. The Court unanimously hold that there is in every contract of life insurance an implied engagement on the part of the assured that he will not, being of sound mind, destroy his own life. The reasoning of the Court, in its opinion written by Mr. Justice Harlan, is unanswerable. He places the parties to the contract before the readers of the opinion, at the time when they made the contract, and he supposes that they had inserted in the contract a provision that the amount insured should be paid, although the assured might voluntarily commit suicide while being of sound mind, and he asked whether a contract thus tempting one to self-destruction and fraud would not be set aside on the ground of public policy. He points out that in every such contract the premium to be paid to the Company for assuming the risk is founded on the probable expectation of life, as collected from experience, excluding the contingency of self-destruction. In fact, he shows that it is necessarily contemplated by the parties to the contract, that the assured will not voluntarily, while understanding the quality of his act, do anything that will operate to enlarge the burden of risk which is assumed by the insurer. A good many precedents are examined, and while we do not see among them any cases precisely in point, yet the Court found in the analogy of *Fauntleroy's* case, (4 Bligh, W. R. 194, 211) strong support for its conclusion. That was an action by an assignee in bankruptcy to secure the amount due on a policy of insurance stipulating for the payment of a certain sum, upon the death of Fauntleroy, to his executors, administrators or assigns. The assured was convicted of forgery and capitally executed. The question, therefore, was whether the parties representing and claiming under one who had effected an insurance upon his life, and afterwards committed a capital felony for which he was tried and executed, could recover upon the policy. It was held by the House of Lords that he could not, and for two reasons: First, it could not be supposed that such a risk had been insured against, or that it was the understanding of the parties that such a risk was covered. Secondly, if such a risk had been insured against in express terms, so much of the policy as insured against it would have been void as contrary to the policy of the law.

The position of the Supreme Court of the United States, in the case under comment, affirming the United States Court of Appeals, 28 U S. app., 612. will appear the more sound and wholesome when the facts of the case are considered. The assured had become liable for breaches of trust in sums which he could not discharge, and he deliberately determined to pile fraud upon fraud by insuring his life for a large amount and then committing suicide. With this end in view he loaded his life down with policies, taking out six in the particular Company, which aggregated seventy-five thousand dollars, and having at the time of his suicide an insurance upon his life amounting to half a million dollars. In order to protect the beneficiaries in the trusts whose money he had made away with, he determined that innocent third parties should bear the loss for him, namely, the members and stockholders of various Insurance Companies who would have to lose it, in the case of Mutual Companies by increased assessments, and in the case of Joint-Stock Companies by diminished dividends. A statement of the facts of the case vindicates the wisdom and justice of the conclusion of the Court. Cases are arising at frequent intervals where desperate men resort to the means—if that expression may be used—of making money by committing suicide. Decisions of this nature warn such persons that the attempt will not be successful. :—*The American Law Review*.

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Res Judicata: extends to adjudications between the same parties or their privies, athough the suit is for a different cause of action.—In the case of *Southern Pacific R. Co.* v. *United States* (168. U S. 1.) decided by the Supreme Court of the United States at its present term in which the opinion of the court is written by Mr. Justice Harlan there is an elaborate discussion of the doctrine of *res judicata.* The court held that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, even if that suit is for a different cause of action. Applying this principle, the conclusion of the Court was that a decision as to the sufficiency of maps to make a definite location or designation of the route of a railroad, on which the title to lands included in a railroad grant depends, is conclusive in another action then pending between the same parties, respecting other lands within the same grant. The court also held that an adjudication of a fact on which depends the title to lands in controversy is conclusive as between the parties, in respect to the title of other lands depending upon the existence or nonexistence of that fact. The Court further held that it is not necessary to plead the estoppel of a former judgment, in order that the party may avail himself of it, but that a former judgment, if admissible in evidence is conclusive on the matters in issue, and actually determined by it,

although not pleaded. The propriety of the ruling of the court on this last point seems doubtful. The general rule is understood to be that estoppels must be pleaded. This seems obviously necessary to prevent the parties against whom they are raised from being taken by surprise, by raising them for the first time by tenders of evidence. The court, however, cites a great mass of authority in favor of the doctrine laid down by Professor Greenleaf, (1 Greenley, Sec. 531) [1] and says that: "The weight of authority, at least in the United States, is believed to be in favor of the position that where a former recovery is given in evidence, it is equally conclusive in its effect as if it were specially pleaded by way of estoppel." ;—*The American Law Review.*

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Negligence: proximate and remote cause—Intervention of stranger to prevent horse from running away. Willis v. *Providence Telegram Pub. Co.* (38 Alt. Rep. 947) the Supreme Court of Rhode Island held that where plaintiff's horse became frightened by a collision with defendant's negligently driven team, and plaintiff seized her horse by the bridle rein in her attempt to prevent him from running away, and was injured in so doing (her baby being in the wagon to which her horse was hitched at the time), the proximate cause of the injury could not be said, as a matter of law, to be some act intervening between the collision and the injury. In the course of its opinion, wriiten by *Tillinghast,* J., the Court said :—

In the case of *McDonald* v. *Snelling,* (14 Allen. 290) where the question as to the proximate cause of an injury caused by a runawayhorse through the negligence of the defendant was very fully considered, the court, in overruling the demurrer to the declaration, said, among other things: "It is clear, from numerous authorities, that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence, as a result which might reasonably have been foreseen as probable, the legal liability continues." In *Mahogany* v. *Ward,* (16. R. I. 479; 17 Atl. 860) this Court recognized the same doctrine; for while it was there held that the independent act of a responsible person arrests causation, and is to be regarded as the proximate cause of the injury, the original negligence being considered merely the remote cause thereof, yet the Court said that this rule "is subject to the qualification that, if the intervening act is such as might reasonably have been anticipated as the natural and probable result of the original negligence, the original negligence will, notwithstanding such intervening act, be regarded as the proximate cause of the injury, and will render the person guilty of it chargeable." See, also, *Lee Railroad Co*; 12. R. I. 383. It certainly cannot be said that

a person who attempts to prevent his horse from running away when it has become frightened by a collision with another team is necessarily guilty of negligence, even though the person in charge of the horse is not in his carriage, and does not actually have hold of the reins, at the time of the collision. And this is even more clearly so when a helpless child is in the carriage, and when the first impluse of every rational person would be to prevent the horse from running away. Whether or not the act of the plaintiff in any given case is in fact a rash, or even negligent, one, and hence such as would prevent him from recovering in an action of this sort, is for the jury to determine in view of all the circumstances of the particular case. :—*The American Law Review.*

REVIEWS.

A Treatise on Aliya Santana Law and Usage by Gangolly Krishna Rao, B.A., LL.B., 1st Grade Pleader, Mangalore. :—*Price* Rs. 2-8.

The want of a text-book on Aliya Santana Law has long been felt. Mr. Krishna Rao's book will, we feel sure, supply the want in a large measure. The case-law has been carefully collected: and texts of Bhutala Pandiya, whose work was till recently supposed to be of high authority, have been referred to. Where the author tries to make out that the Aliya Santana Law is completely different from the Hindu Law and that the rules of Hindu Law can no more be applicable to the Aliya Santana Law than to people governed by Muhammadan Law or to Parsis, we cannot agree with him. On the other hand, the Aliya Santana Law, like the Marumakkatayam Law of Malabar, is in many parts only an archaic type of Hindu Law. And the principles of Hindu Law would in many cases be applicable where no usage to the contrary is established. The Chapter on Marriage will be found interesting reading even by laymen. And the chapter on the comparison between the Aliya Santana Law and the Malabar Law is instructive. We are by no means sure that the Aliya Santana rule that the self-acquired property of a deceased member of a family should go to the members of his branch is not the correct rule with regard to the Malabar Law also. Anybody acquainted with Malabar knows that, as a matter of fact, the nephews and sisters of a man take his property and not the Karanavan of his tarwad. Mr. Krishna Rao's book will, we feel sure, be found to be useful and we have no hesitation in recommending it to the profession.

The Madras Law Journal.

PART XII.] DECEMBER 1898. [VOL. VIII.

THE ART OF LAW-REPORTING.

The completion of four more volumes of the Indian Law Reports affords an occasion for an examination of the general principles of the art of law-reporting, and the particular methods adopted in these publications. The art of law-reporting consists in the selection, from the mass of cases decided by the Courts, of the comparatively few cases which in effect make new law, or will be useful in the solution of future legal problems; in the elimination from these cases of all matters which do not assist the objects for which they were selected; in presenting the residuum in a concise and intelligible form; and, lastly, in furnishing an exhaustive classification and index of the subjects dealt with.

The selection of cases is the most difficult of the reporter's tasks, since it requires not only that he should be a good lawyer, in order that he may appreciate to what extent, if any, a given case has altered and modified the law, but also that he should carefully examine the case to ascertain whether it will be an authority upon the point it deals with. A reporter should not, of course, refuse to report a case, because it is, in his opinion, bad law; (*a*) but if, upon examination, he finds that it is inconsistent with other authorities which were not cited to the Court, or was decided *per incuriam*, (*b*) he, or preferably the Central Editor originally contemplated by the founders of the Indian Law Reports, (*c*) should take the opinion of the Court as to whether the case should not be suppressed. A striking instance of the necessity for this examination is to be found in the current volume of the Madras Reports, (*d*) in a case of which

(*a*) See Proceedings of the Legislative Council, Vol. XIII, p. 84, *per Mr. Hobhouse.*

(*b*) See *Rama Reddi* v. *Appaji Reddi*, 1894, 818 M. 248, and the remarks thereon in *Thayar Ammal* v. *Lakshmi Ammal*, 1895, 18 M. 331, pp. 333, 338.

(*c*) *Proceedings of the Legislative Council* Vol. XIV, p. 21.

(*d*) *Sankaralinga Mudali* v. *Rathnasabbapati Mudali*, 1897, 21 M. 324, p. 326.

the head-note might well be "a serving officer may select the manner of serving process most convenient to himself, and such service is good service of process." This is, no doubt, the common practice of the mofussil, but it has been condemned by an authority which was not cited to the Court; (e) as well as by the authority which was cited and relied upon. The careful selection of cases by the Reporter, in collaboration with a Central Editor, and the submission of doubtful cases to the Court, would probably have kept out of the Reports many conflicting decisions, which may now follow one another at the interval of a few pages (b).

No case should be reported which merely applies an ascertained rule of law to a new combination of facts (ee); unless, as sometimes happens in the development of modern science and trade, the facts are so novel that the application of the old rule thereto is in fact a development of the law. This rather vague principle may be better expressed as a rule of practice:—"In deciding whether a case should be reported or not, first state the principle of the decision in abstract terms, without reference to the special facts of the case, and then ascertain whether this rule has been already authoritatively enunciated." In other words, before reporting a case try whether it is possible to write a decent head-note for it; and, though I am aware that the learned author of the Bombay Reports appears to be of a different opinion, I would submit that a head-note should state the *ratio decidendi* merely, and not consist of a précis of the facts, the authorities cited, and the judgments, occasionally enlivened with quotations from the last(*f*).

The application of this rule would prevent the multiplication of Reports dealing with the construction of particular documents; in such cases we often find the Court expressly declaring that it will look only to the intention of the parties, and that one document cannot be used to construe another; and the English Courts will often refuse to look at previous authorities, on a mere question of construction. And yet it is common enough to find in a head-note "Held, upon the construction of the mortgage-deed, the parties intended, &c."(*g*) Apparently the only reason for reporting the case

(*e*) *Cohen* v. *Nursing Dass Auddy*, 1892, 29 Cal. 201.

(*ee*) See 20 A. 307, 315, 447; 25 C. 824.

(*f*) See 22 B. 850, 862, 898.

(*g*) See 25 C. 246, and p. 248, *per Maclean*, C.J.

just referred to was that a similar case was cited, that is, that a former Reporter had sinned in a similar manner.(*gg*) Cases which merely follow another case should not be reported,(*h*) unless the latter be a decision of another High Court.

I venture to think that a case should never be reported on account of the *obiter dicta* of the Judges; they often cause serious difficulty when the question they deal with comes up for actual decision, and frequently have to be explained away or put on one side altogether. Take, for instance, the case of *Amrito Lall Dutt* v. *Surnomayi Dasi*(*i*), which occupies over thirty pages of the Reports. The appellate Court held, on the construction of a will, that a power to adopt had been given to the widow jointly with other persons; and there does not appear to have been any argument that such a power was valid. The case was decided on this point by two of the Judges, who expressly declined to go into another question, as to the validity of a direction to accumulate income; the judgments of the third Judge in the appellate court, and of the Judge in the Court below, on the latter point, were therefore mere *obiter dicta*, and the case is only an authority upon the construction of a particular will, and should, I think, have been omitted altogether. To report *obiter dicta* is to give to the Reports the functions of legal treatises, which was not apparently the intention of the founders of the Indian Law Reports. (*j*)

It is also not one of the functions of the Reports to direct the attention of a Court to its neglect of ordinary legal principles and methods; unfortunately it is often necessary that this should be done, but it would be more decently and effectually accomplished by a confidential official communication. Nevertheless, this appears to be the only reason for reporting a Privy Council decision which occupies nine pages of the Allahabad Reports,(*k*) and another case in the same reports, which decides that a Court shall not amend a decree, which has been drawn up in accordance with its own judgment, so as to make it inconsistent therewith (*l*). In the Calcutta Reports

(*gg*) See also 20 A. 103; 25 C. 816.

(*h*) See, however, 20 A. 781.

(*i*) 25 C. 662.

(*j*) See Proceedings of the Legislative Council, Vol XIII, pp. 63, 64.

(*k*) See 20 A. 209, p. 218.

(*l*) 20 A. 337.

there are several cases, of which the principal, if not the only, use is to inform a Sessions Judge that there is really a material difference in function between the Judge and the jury (*m*).

I have already indicated the form which should, in my opinion, be given to the head-note; but in the Indian, as in the English, Law Reports, the favorite form is a resumé of the facts followed by a short statement of the decision of the Court thereon. This form of head-note is often prepared by taking from the judgment, almost *verbatim et literatim* those portions which set out the general facts of the case, and the findings of the Court.(*n*) This practice virtually amounts to throwing the burthen of deducing the *ratio decidendi* upon the reader.

Moreover, the facts are usually stated with a particularity and detail which distract the reader's attention from the essential elements of the case.(*b*) In the case cited the material facts were that a mortgagee paid money in order to avoid a sale of the mortgaged property under a superior title, during the pendency of litigation between the mortgagee and the mortgagor, in which the question was whether the mortgagee had, in fact, any subsisting interest in the property, and in which it was subsequently determined that he had no such interest. The decision of the Court was that an interest contingent upon the uncertain event of the litigation being determined in the mortgagee's favour, was sufficient to sustain a suit by him for repayment of the money by the mortgagor. But the reporter informs us in his head-note of the nature of the mortgaged property, the amount of the mortgage-moneys, and the various stages, with the exact dates, of the litigation, in the High Court and the lower Court, between the mortgagee and the mortgagor. It may often be useful to supplement the abstract statement of the principle of the decision by a statement of the concrete facts dealt with by the Court, but the inclusion of irrelevant facts simply shows that the Reporter has been too lazy to master the case, and this, no doubt, is the explanation of the lengthy head-notes, extending frequently to a page of small print, sometimes to considerably more, which a long-suffering profession has to endure(*p*).

(*m*.) 25 C. 230; 361; 711.

(*n*) 20 A. 237; 22 B. 899

(*o*) *See* 25 C. 306.

(*p*) 22 B. 88, 833, 849, 861, 875, 899. 25 C. 354, 524, 425. 21 M. 310. 20 A. 103, 267, 482.

We come now to the body of the report, of which the first part should consist of a concise statement, as far as possible in chronological order, of the facts on which the judgment was based.

If the decision be that of an appellate Court, it is of no interest to the general reader to know the names or official designations of the Judges in the lower Courts, or the serial numbers by which the case was there distinguished; these matters, if thought material, should be placed in a foot-note, as is done in the Calcutta Reports. It would also be an advantage to the reader if the Reporter who is unable or unwilling to compile a succinct statement of the facts and arguments, were to print, once for all, at the beginning of his volume, a notice that "except where otherwise expressly stated, the facts and arguments in each case appear sufficiently for the purposes of the report from the judgment of the Court." This beautiful phrase has become stale by constant repetition in the Queen's Bench and Indian Law Reports, and is, in fact, of doubtful utility to any one but the Reporter.

Documents and pleadings should never be quoted *in extenso,* unless the precise words used are material; which in India, where pleading is informal and conveyancing unknown, can rarely be the case. The construction put upon any material document by the Court can usually be found shortly stated in the judgment, and can be stated as one of the facts of the case; the document itself and the argument by which the Court arrived at a particular construction may generally be omitted both from the statement of facts and the judgment itself. If, however, it is necessary to quote a document, only so much should be given as is absolutely necessary, and that should be printed in small type, and should not be again repeated in the judgment. For example, if the Court has held as a fact that a document is a usufructuary mortgage without a covenant to pay the mortgage moneys, it is not necessary to set out the document in full, or to exemplify the quaint pleading of the mofussil by reciting the whole plaint.(q) It is true that this method adds more than a page to the Reports, but that is another story. Neither is it necessary, in a case in which the questions are whether a grant of probate shall be made

(q) See 21 M. 476, and 25 C. 693, 694.

to a person as executrix according to the tenor, and on what portions of the estate the Administrator-General is entitled to charge commission, to set out a lengthy and informal holograph will and two codicils, which extend over more than *four* pages of small type.(*r*) The former question is, moreover, merely one of the intention of the testator, and should not have appeared in the report at all. Again, the utility of setting out the full text of the reference by a lower Court to the High Court is generally doubtful, but surely there can be no doubt of the absurdity of so doing in a case in which the High Court decided that the lower Court had no power to make the reference at all.(*s*) This is paralleled by the case in the Madras Reports cited above (*t*), which sets out a preliminary order of a Divisional Court remitting the case to the lower Court for findings of fact, occupying about three-fourths of a page, and also the order of reference to the Full Bench occupying about a page and a quarter; the former order is, of course, wholly irrelevant, and the latter is really *obiter dictum,* and contains a view of a previous case different from that taken by the Full Bench. It is also surely unnecessary to state that the Divisional Court passed a decree in accordance with the judgment of the Full Bench; if it did not, there would indeed be a case worthy of report. The statement that this purely formal procedure was duly followed is, however, repeated in the reports *ad nauseam.* A good example of the diffuse character of the reports is to be found in the report of a recent decision of the Privy Council (*u*), in which the principal question was whether a particular mortgage deed gave *post diem* interest, that is, a question of construction, and the question was also incidentally raised whether proceedings in Court stating the amount due on the mortgage fell within section 17 of the Registration Act, 1877. On the first point the case is valueless, except to call the attention of the Court below to the general principles upon which documents should be construed; the second point is dealt with in eight lines of the judgment. Nevertheless, the Reporter has filled ten pages with a statement of facts, the judgment of the High Court, and the entire judgment of the Privy Council

(*r*) 25 C. pp. 66—71. See also 22 Bom. 355, and 21 Mad. 310.

(*s*) 25 C. 488, 896.

(*t*) 21 M. 476, pp. 478—479.

(*u*) 20 A. 171, 172.

which sets out the exact terms of the mortgage-deeds and the history of the suit in the lower Courts. It would seem, in fact, that the judgments of the Court are reproduced *verbatim*, and are not edited at all, and this would appear to be a principal cause of the diffuseness of the Reports. Only that portion of the judgment should be given which deals with the point for the sake of which the case is reported, and the Reporter should also eliminate all recitals of the evidence, and the reasoning of the Court thereon. Also it is unnecessary to set out in full sections of common Acts quoted by the Court, such as a section of the Criminal Procedure Code (*v*), or the Tenancy Act (*w*), or quotations from reported cases (*x*), or common forms prescribed by the rules of Court (*w*). Every report should be submitted to the Court in proof, in order to avoid any slip on the part of the Reporter, and to enable the Court to correct any inaccuracy in the judgment thus edited.

The arguments of counsel should be stated, if possible, in logical order; each proposition advanced by them being followed by the cases cited in support thereof. A general statement that counsel referred to certain cases is a confession that the Reporter either did not hear the arguments, or did not understand them, and is of very little use to the reader. The references to all cases cited should be carefully verified, and the date of decision prefixed to each, as is now done in the English and Calcutta Reports.

The last task of the Reporter is to select the appropriate catchwords to place at the head of the report. They should consist of those words which would be chosen in making an index to the reports, and not of short sentences stating, more or less ungrammatically, the effect of the head-note (*y*). For the assistance of the Reporter, and to facilitate the preparation of the index, he should be furnished with a list of the titles, sub-titles, and cross-references which will be used in making the general index, similar to the list published in the English Law Reports Digest (*z*). From this list he should select the most general word for his first catch-word, and proceed from genus to species and sub-species until he arrives at the mere variety or sport of which the average reported case consists, and should

(*v*) 25 C. 215.
(*w*) 25 C. 216.
(*x*) 20 A. 55,
(*y*) 22 B. 961.
(*z*) Digest, 1865—1890, Vol. I, p. dcclv,

conclude with a reference to any statute or rule under which the Court has proceeded. For example, the catch-words to the case just referred to (y) should be "Practice—Execution—Arrest—Lunatic—Discretion of the Court—Civil Procedure Code (Act XIV of 1882), S. 33-A." The work of the index maker would thus be based on that of the Reporter, who has presumably carefully considered and analysed each case.

The index of cases should consist of the names of all the cases arranged in alphabetical order. This is so obviously the most convenient arrangement for a reader in search of a particular case that it is impossible for any one, not familiar with the inner working of the Indian Law Reports, to attempt to explain why the cases are arranged according to the several jurisdictions of the High Court; so that a reader who does not know whether the case he requires was decided by the Privy Council, a Full Bench, or on reference from a Small Cause Court, has to glance through perhaps a dozen or more separate indices. The Allahabad Reports, howevr, have now adopted a single index; and the indices of the cases cited in the Reports are, strange to say, always arranged alphabetically. The definite article does not, I may observe, furnish the proper index letter to a case (a).

The index of subject-matter will, of course, consist of the head-notes of the several cases arranged according to their most distinctive catch-words, with cross-references chosen from the other catch-wards. It is *not* necessary or expedient that the same head-note should be repeated several times in full (b); a cross-reference is generally sufficient. It is not pleasant to toil slowly through half of an involved head-note, and then to realise that it had already annoyed you a few lines above, on the same page.(c)

The form of the monthly numbers is not worthy of a Government publication. The system of printing the indices on one side only of very thin paper cannot lead to any appreciable saving of expense, and in the Bombay and Calcutta Reports is annoying;

(a) Allahabad Reports, May 1898.

(b) Indices to the Madras Reports, *passim*.

(c) Madras Reports, July 1898, p. iv: and three other cases in the same number, pp. iii and vii; iv and vi; v and vii. Compare Bombay Reports, November 1898, pp. iv, vii and xiii.

since the printed pages tend to adhere. The Bombay and Allahabad Reports are disfigured by advertisements printed on pages and inserted slips of the crudest colours, in a manner which would appear to have been copied from the trade catalogue of some provincial haberdasher. Sometimes portion of the reports is printed on a page of the same colour as the advertisement sheets.(*d*)

It is obviously desirable that the reports of cases should be published as quickly as possible, and that, after accuracy, the Reporter should aim at speed. In this respect the Allahabad Reports appear to excel the others; in the earlier numbers of 1898 the interval between decision and publication in these reports is about six months, in the later numbers about four months. In the Calcutta Reports, some cases are reported three months after the decision, and the average probably does not exceed six months. In the earlier numbers of the Madras Reports the majority of the cases are about six months old, but in the October and November numbers, curiously enough, there are batches of cases decided in August, November and December, and even earlier months, of 1897, which would increase the average considerably. The Bombay Reports lag far behind the others; the number for April 1898, for example, contained 13 decisions of 1896 and one only of 1897, and it is not until the August number is reached that the decisions of 1897 preponderate. The September number contains cases decided in July, August and September 1896, that is, more than two years previously. There is also often a delay of several weeks in the delivery of the numbers, especially in the case of the Allahabad reports, which should be considered in estimating the speed of Publication.

In the debates upon the Bill which resulted in the Indian Law Reports Act, 1895, it was assumed by Mr. (now Lord) Hobhouse that there would be a Central Editor who would revise the reports sent in to him, and return those which were defective for correction by the Reporter; and he observed that, "the whole thing depends very much on the relations of the Editor, the Reporters, and the Judges, which must be adjusted from time to time, perhaps at short intervals"(*e*). I do not know what period has elapsed since the last *adjustment*, but I venture, on this authority, to submit that the

(*d*) Allahabad Reports, February 1898.

(*e*) Proceedings of the Legislative Council, Vol. XIV, pp. 20, 21.

present condition of the reports shows the necessity of an arrangement under which a Central Editor would be invested with and exercise large powers of revision and control.

J. J.

CHAKKRA CHAPAN v. MOIDIN KUTTI 8 M. L. J., REP 231.

The decision of the Full Bench of the Madras High Court in the above case discloses an extraordinary degree of difference in the opinions of the learned Judges, which is unfortunate when we have regard to the importance of the point in dispute, and which is not justified by any unusual difficulty in the questions involved. Every Judge almost seems to differ from every other Judge to a greater or less extent, and we have considerable misgivings as to the manner in which each learned Judge will seek to give effect to the Full Bench rulings in cases in which the same question may arise before him. The case before the Full Bench was briefly this, whether an appeal lies to the High Court from the decision of a single Judge of that Court in a revision petition under S. 622 of the Code of Civil Procedure. Two questions were argued as arising for decision under the reference to the Full Court—(1) Whether the exercise of revisional powers under S. 622 is the exercise of appellate jurisdiction within the meaning of S. 15 of the Charter Act or whether such jurisdiction is neither original nor appellate, but of a class by itself, akin to the powers of superintendence possessed by the High Courts under S. 15 of the Charter Act. (2) Supposing that revisional jurisdiction is comprised in appellate jurisdiction, whether an appeal lies under S. 15 of the Letters Patent which provides an appeal against the judgments of a single Judge of the Court in its original or appellate jurisdiction, or whether Ss. 588 and 591 of the Code of Civil Procedure read together take away the appeal which undoubtedly would otherwise exist. We have dealt with the latter question at length on a former occasion (see 2 M. L. J. 343) and do not propose to make more than one or two observations at present, though we must make some remarks on the judgment of *Boddam* J., on the point. The former question was raised for the first time now in the Madras High Court, and has led to a difference of opinion between the learned Judges. *Subrahmania Aiyar*, *Benson*, and *Moore*, J.J., hold that revision is

a part of appellate jurisdiction. *Shephard*, O. C. J., on the other hand, is inclined to think that it is not, but he apparently thinks that the opposite view has prevailed so long that he defers to it, especially as in the Judicial Committee of the Privy Council itself, the question has not been raised, though occasions for doing so have arisen. *Boddam* J., preferred to give no opinion on the matter. *Davies*, J., however, has expressed a strong dissent in a somewhat lengthy opinion. The leading judgment in favour of the view that revision is a part of appellate jurisdiction is that of *Subrahmania Aiyar*, J., and the argument of the learned Judge is so convincing that we do not propose to add anything to it. He refers to *Navivahoo* v. *Turner*, L. R., 16 I. A., 156, where though the question, whether, revision, is a part of appellate work did not arise, their Lordships of the Judicial Committee do observe that there are only three heads of jurisdiction, ordinary original, extraordinary original and appellate. Their Lordships observe that "they are confirmed in this view by observing that in the next group of clauses (*i.e.*, clauses 19 to 21), which indicate the law to be applied by the Court to the various classes of cases, there is not a fourfold division of jurisdiction, but a threefold one into ordinary, extraordinary and appellate." We will not repeat the other arguments of *Subrahmania Aiyar*, J., but proceed to examine briefly the dissenting judgment of *Davies*, J.

As far as we can gather from the judgment of the learned Judge, it seems almost to be self-evident to him that 'revision' cannot come under the head of appellate jurisdiction. By the very words of S. 622 of the Code of Civil Procedure, the power of revision exists only where there is no appeal. Therefore, argues *Davies*, J., "revision is opposed to appeal instead of being comprised in appellate jurisdiction." Now there is no doubt that in the Code of Civil Procedure the word "appeal" is used in a limited sense, which 'excludes' revision. But nothing is more clearly established in the matter of construing statutes than that it should not be assumed that because a word is used in a certain sense in one statute, it is therefore used in the same sense in another statute, unless both statutes be in 'pari materia.' *Humble* v. *Mitchell*, 11 A and E. 205, see also Maxwell on Statutes, 2nd Ed., pp. 47, 48; *Dayachand Nemchand* v. *Hemchand Dharamchand*, I. L. R., 4 B., 515. Here the statutes undoubtedly are not in 'pari materia.' Moreover, one of the statutes was passed in England; where the word 'revision' is not used at all to denote the examination by a superior tribunal of the decision of an inferior tribunal, whatever be the

scope of such examination. If in the English law, the words 'revision' and 'appeal' were used in the sense that they are in the Indian Code of Civil Procedure, there would undoubtedly be force in Mr. Justice Davies' argument that 'revisional' cannot be a species of appellate jurisdiction. But since the word is not generally used in the English law, we think the learned Judge was not justified in importing into the English law the idea of revision in the restricted sense in which it is used in our Code of Civil Procedure. On the other hand the word "appeal" is often used in the general sense of the examination by a superior tribunal of the decision of an inferior tribunal. *Davies*, J., makes no answer to the argument of *Subrahmania Aiyar* J., that in speaking of the law to be administered by the High Court, the Letters Patent speak only of three jurisdictions—ordinary original, extraordinary original, and appellate, thus indicating that these embrace the whole of the High Court's jurisdiction, where it has to administer law, *i.e.*, to act judicially. Are we to suppose that, according to the Letters Patent, 'revision' is not a part of appellate jurisdiction, but that still, we are not told what law the High Court is to administer in revision? 'Revision is opposed to *appeal* only in the sense that one kind of 'appeal' is opposed to 'appeal' in the restricted sense in which that term is used in the Code of Civil Procedure.

The next argument of *Davies*, J., is that an appeal involves a re-hearing and a fresh judgment, while there is neither in revision, and the learned Judge says that the functions of the High Court in revision are confined to those of the High Court of Justice in England in the case of a writ of prohibition, mandamus, or certiorari, *i.e.*, quashing proceedings conducted without jurisdiction, directing a Court to try a case where it wrongly refuses jurisdiction, or directing a thing to be done over again. We are by no means prepared to subscribe to the view that the jurisdiction of the High Court in revision is as limited as the learned Judge attempts to make out. The Privy Council laid down no doubt in *Amir Hassan* v. *Sheo Baksh* I. L. R., 11 C., 6 that the High Court cannot interfere with the decision of a lower Court in revision under S. 622, Civil Procedure Code, merely becaue it has wrongly decided a question of law; but their Lordships certainly cannot be said to have laid down, that the revisional jurisdiction of the

High Court is confined to questions of jurisdiction, for that would be to expunge altogether the words, "or to have acted in the exercise of its jurisdiction illegally or with material irregularity." A Full Bench of Madras High Court has, in fact, laid down in *Krishtamma Naidu* v. *Chapa Naidu*, I. L. R., 17 M. 411, that the Court has power to revise even in cases when no question of jurisdiction arises. *Davies* J., himself decided in that case that errors of procedure could be corrected in revision where such errors are likely to have caused failure of justice. Another learned Judge held that when the judgment is perverse either with regard to substantive or processual law, the Court could interfere in revision. It is difficult to assimilate the powers of the High Court in revision to those exercised by the High Court in England in the case of the writs above referred to, though, no doubt the powers exercised in the case of such writs are included in the powers of revision. But even if they were similar, does it at all follow that there is no re-hearing in revision? With all deference to the learned Judge, we have no doubt that the High Court has full power in revision to pass a fresh judgment. The section lays down that the High Court "may pass such order in the case as it thinks fit." There is no reason for holding that this does not include the power of modifying the judgment of the lower Court and passing a fresh judgment and decree in the case. Suppose the Court holds that the lower Court had no jurisdiction to try a suit, has not the High Court the power to dismiss the suit? Should it direct the lower Court to do so? Or suppose the Court holds that jurisdiction was wrongly assumed over part of a subject matter of a suit, should it send back the case for a fresh judgment being passed? If such was the meaning, we think the Legislature would have used apt words to make it clear. We need hardly say that the view of the learned Judge is entirely opposed to the practice of the High Courts till now. The High Court has not hesitated to confirm, reverse or modify the judgments of the lower Court and pass its own decrees where it thought fit to do so. But supposing the High Court could not pass a definitive judgment finally disposing of the case, but has to direct the lower Court to do so, why should it be said, that such direction is not in itself a judgment, when it decides what the lower Court should do? In second appeals where the trial has been irregular and the question is one of fact, the High

Court cannot itself decide the question, but can only direct the lower Court to re-try the case in accordance with such directions as it may choose to give. And yet nobody has doubted that in such cases, the High Court does pass a *judgment*. It is even more difficult to understand the learned Judge, when he says there is no re-hearing in revision. When the High Court hears the case to see whether the lower Court has exercised a jurisdiction not vested in it by law, or whether it has failed to exercise a jurisdiction vested in it, or whether it has acted illegally or with material irregularity in the exercise of its jurisdiction, is not the High Court *hearing* the case? No doubt the whole case is not re-heard; but neither is it in a second appeal. The Court cannot try questions of fact on second appeal, and yet it is not doubted that the case is re-heard in second appeal. Why should it be said that there is no re-hearing in revision, simply because the scope of the hearing is even more narrow than in second appeals.

The next argument of the learned Judge is that it is in the interests of the public as much as in those of the individual that this power of control is given, and the Court may, therefore, act of its own motion under S. 622, which it cannot do in appellate matters. Here again it is very difficult to follow the learned Judge. How does it follow that, because the Court can act of itself its jurisdiction is not a species of appeal. We are not aware of any general principle that an appeal can only be at the instance of the party aggrieved. No doubt, in the sense in which it is used in the Civil Procedure Code, it must be so. We would repeat what we have already said, namely, that we have no business to assume that the word is used in the same sense in the Letters Patent, as in the Civil Procedure Code.

Again, the learned Judge observes that in S. 15 of the Charter Act the power of superintendence of the High Court (which according to the learned Judge includes the power of revision) over inferior Courts is grouped together with the power to call for returns and to make rules of practice and to prescribe forms, as well as the power to direct the transfer of a suit or appeal. "If", observes the learned Judge, "appellate jurisdiction be taken to denote the first-mentioned power, it would be difficult to say why it should not equally denote all the other powers mentioned in the section." At

first sight, the argument seems to have some force. But we cannot fail to notice that this section embraces judicial, quasi-judicial, legislative and executive or administrative powers. The power to call for returns is purely executive or administrative in its nature. The power to make rules of practice and to prescribe forms is of a legislative character. The power of transferring a suit or appeal is, we should say, judicial, as is the power to exercise superintendence over inferior Courts. We see no violence in classing the powers which are judicial in character under the appropriate head of the Court's jurisdiction. It is no reason against doing so that the section speaks of other powers which are not judicial at all. We have assumed that the power of superintendence does include the power of revision; and we do not think it necessary for our present purpose to examine whether this view is correct, though *Moore, J.*, seems to think it is not, see however, *Tej Ram* v. *Har Sukh*, I. L. R., I A., 101, *in the matter of Lukhy Kant Bhose*, *Ib.* 1 C., 180. Supposing it does, that would not affect our argument as already observed. Moreover, there is no reason for saying that, because S. 15 of the Charter Act groups judicial powers with non-judicial powers which cannot be classed under appellate jurisdiction, the powers of the Court under S. 622 should be held not to come under the term appellate jurisdiction in the Letters Patent.

One more argument of *Davies*, J., remains to be dealt with. S. 36 of the Letters Patent enacts that any function which is hereby directed to be performed by the High Court in the exercise of its original or appellate jurisdiction may be delegated by the Court to any Judge or any Division Court by rules framed for the purpose. The learned Judge says "that it could hardly be argued that the power of making rules is one of the functions for which provision is made in cl. 36 of the Letters patent." We agree with the learned Judge; but S. 36 cannot include the power of making rules only, because such power is not judicial but legislative, and cannot, therefore, be a branch of the Court's judicial jurisdiction which alone can be classed under original and appellate jurisdiction.

We have now dealt with all the arguments of *Davies*, J., for showing that revisional is not part of appellate jurisdiction. We will only say one word more about his actual answer to the reference. Having come to the conclusion that the order of a Judge in revision is not

passed under the appellate jurisdiction of the Court, the learned Judge is of opinion that S. 15 of the Letters Patent is inapplicable and gives no right of appeal in such a case. But he holds that under the rules of the Madras High Court, a single Judge could not hear a revision petition after it had been once admitted and notice has gone to the counter-petitioner. Under the rules a Bench of two Judges should hear such cases. It is strange that the learned Judge should not have gone further and said that under S. 36 of the Letters Patent and S. 13 of the Charter Act, the High Court would have no power to make a rule delegating the hearing of revision petitions either to a single Judge or to a Bench of two or more Judges and either for admission or for final disposal if its power of revision is not a part of its appellate jurisdiction. *Davies,* J., himself points out that cl. 36 of the Letters Patent will not include the power of making rules under S. 15 of the Charter Act. How then could it include the power of revision if it is not a part of the appellate jurisdiction? The fact is that the result of the learned Judge's view would be, as pointed out by *Benson,* J., that the whole Court would have to sit to dispose of revision petitions and transfer petitions if they cannot be held to be a part of the Court's appellate jurisdiction. Can it be that before writing their judgments the learned Judges did not discuss the question with one another? Or how comes it that *Davies,* J., seems to hold that a Bench of two Judges may, according to his view of the case, dispose of a revision petition, while as pointed out by *Benson,* J., his opinion necessarily leads to the conclusion that the whole Court must hear revision petitions?

As we have already said, we do not propose to deal at length with the view of *Benson,* J., that S. 591, C. P. C., precludes an appeal against the decision of a single Judge in a revision petition. The learned Judge says that the reasons he gave for his opinion, in *Upadhyaya* v. *Visvaraja Tirthasami,* I. L. R., 20 M. 407, would be regarded as absolutely conclusive, but for an observation of their Lordships of the Privy Council in *Harish Chunder Chowdhry* v. *Kali Sundara Debia.* We do not hope to shake the confidence of the learned Judge by adding any fresh arguments to those we have already adduced in our previous article. But we would suggest one observation about the judgment of the learned Judge. Under S. 595,

C. P. C., an appeal lies to the Privy Council from any final decree or order of the High Court. But under S. 597 no appeal would lie to the Privy Council against the judgment of a single Judge. The result of Mr. Justice *Benson's* view is that when an order is passed by a single Judge of the High Court in an appeal under S. 588, C. P. C., or under S. 622, no appeal would lie to the Privy Council, which is against the provisions of S. 595, although an appeal would lie if the order were passed by a Bench of two Judges. To our mind this is conclusive against the view of the learned Judge. We admit that S. 591 read by itself is strongly in favor of his view. But the provisions of S. 595 and of the Letters Patent clearly show that S. 591 does not apply to orders passed by a Judge of the High Court.

We may be permitted also respectfully to demur to the manner in which *Benson*, J., disposes of the judgment of the Privy Council. There cannot be the slightest doubt that the ratio of the Privy Council decision is against the view of the learned Judge; and we do not think it is permissible to override the judgment by showing that the actual decision can be supported on other grounds than those on which it really proceeds.

We must say a word about Mr. Justice *Boddam's* judgment before we close. It is very difficult to understand it. The learned Judge says that against an order in a revision petition there would be an appeal, if the order amounts to a judgment. We perfectly agree. It cannot be contended that against a mere interlocutory order under S. 622 an appeal would lie. But the learned Judge proceeds to agree with *Benson*, J., in saying that S. 591, C. P. C., applies to orders under S. 622 passed by a single Judge. The learned Judge evidently did not perceive that in that case there would be no appeal in any case against an order under S. 622, whether it amounts to a judgment or not. He actually holds that in the particular case there was an appeal, because the order amounted to a judgment. It is impossible to resist the conviction that the learned Judge did not understand the judgment of his colleague Mr. Justice *Benson*.

Very recently a Bench of the Bombay High Court also has held in *Hiralal* v. *Bai Asi*, I. L. R., 22 B., 891 that there is no appeal against the order of a single Judge of the High Court refusing to

issue a rule *nisi* under S. 25 of the Provincial Small Cause Courts Act, which confers on the High Courts a discretionary power to interfere with judgments and orders of Small Cause Courts, or when they are not in accordance with law. One of the learned Judges proceeds on the ground that S. 13 of the Charter Act provides only for the exercise of original and appellate jurisdiction and does not deal with the revisional or extraordinary jurisdiction which is vested in the Court by S. 15 of the Act and by various Acts of the Legislature of this country. The learned Judge does not discuss the question at any length, but observes that to hold that there would be an appeal in such a case would lead to the inference that there would equally be an appeal from an order calling for a return or from any other act done in the performance of revisional or extraordinary jurisdiction. As we have already pointed out the error in this view is in not making a distinction between judicial and non-judicial or quasi-judicial orders. Under S. 15 of the Letters Patent an appeal is provided only against a judgment, and an order calling for a return is certainly not a judgment. *Ranade,* J., does not base his judgment on the same grounds as his colleague. He says that an order declining to issue a rule *nisi* is not a judgment and that the power conferred on the High Court by S. 25 of the Provincial Small Cause Courts Act is expressly stated to be discretionary in its nature, and that it, therefore, does not fall within the category of a judgment passed in the original or appellate jurisdiction of the Court. He observes that there is no precedent where any such appeal was allowed. The learned Judge's attention was apparently not drawn to the case of *Vencatta Reddi* v. *Taylor,* I. L. R., 17 M., p. 100 where *Muthusamy Aiyar* and *Best,* J.J., decided that an appeal would lie in such a case.

NOTES OF INDIAN CASES.

Debi Das *v.* Nirpat. I. L. R., 20 A. 365. In the case of a contract in favor of joint contractees and a suit by the surviving contractees for the recovery of the debt where some have died, the question has been raised as to the necessity for joinder of the representatives of the deceased. The High Courts of Allahabad, Bombay and Madras have decided in favor of the maintainability of the action by the survivors alone. But the argument in favor of the necessity for the joinder of the representatives also has been strongly put by the Bombay High Court

in *Motilal Bechardass* v. *Ghellabhai Hariram*, I. L. R., 17 B, 6. The logical position is that of the Calcatta High Court, though the Bombay Court adhered to the old practice before the Contract Act. See also *Vaidyanatha Ayyar* v. *Chinnasami Naik*, I. L. R., 17 M. 108.

Bansi Lal *v.* **Ramji Lal**, I. L. R., 20 A. 370. A point of considerable interest is dealt with in this case by *Knox, Acting Chief Justice* and *Banerji*, J. They hold that it is not competent to a defendant to seek to invalidate judgment between the same parties on the ground of fraud; and that he can only do so by a separate suit. S. 44 of the Evidence Act, however, is very wide in its terms and though it is to be somewhat limited as inapplicable, to judgments obtained by collusion between the parties and to cases where the party impeaching was himself guilty of the fraud, we can see nothing in principle precluding its application where the fraud is set up by the defendant. The decision relied on *Karamali Rahimbhoy* v. *Rahimbhoy Habibhoy*, I. L. R., 13 B. 137 is no authority for the position taken by the learned Judges, though *Scott*, J., refers to English cases where it is laid down that a fraudulent judgment can be vacated only by review or by original bill. S. 44 of the Evidence Act, however, is explicit, and the defence of fraud would be open to a defendant so long as a suit to set aside a judgment has not become barred.

Shiam Behari Lal, *v.* **Rup Kishore**, I. L. R., 20 A. 379. A sale in excution of a decree was made by the Collector under the rules framed by Government under S. 320 of the Code. The sale was set aside for irregularity. The purchaser who was also the decree-holder brought the suit for a declaration that the sale was good.

The question is raised whether such a suit is maintainable. The last clause of S. 312 has no application; because the suit was not one to set aside an order passed under the section on the ground of irregularity. But the question remains whether a separate suit is contemplated where special provision is made dealing with irregularities. There is also an appeal provided by law under S. 588 of the Code. It is another matter where the sale is set aside upon grounds other than those mentioned in S. 311. We cannot suppose that it was intended that where a sale is set aside on the ground of irregularity in the publication or conduct of sale, it is open to the party affected by it to bring a regular suit to contest the order. See *Viraraghava Aiyangar* v. *Venkatacharyar*, I. L. R., 5 M. 217.

Nihali *v.* **Mittar**, I. L. R., 20 A. 446. The decision in this case follows the Calcutta decision in *Poresh Nath Mojumdar* v. *Ramjodu*

Mozumdar. I. L. R., 16 C. 246. When the time stipulated for redemption the decree has expired, the decree-holder is still entitled, according to the learned Judges, to make the payment and claim redemption, unless the order absolute has been made. The decisions in *Vallabha Valiya Rajah* v. *Vedapurratti*, I. L. R., 19 M. 249, and *Ram Lal* v. *Tulsa Kuar*, *Ib.* 19 A., 180, do not appear to have been brought to the notice of the Court. We are unable to see how the condition having failed, the decree-holder can still claim execution, unless the time is extended as provided by the Act.

Behari Lal *v.* **Muhamma Muttaki**, I. L. R., 20 A. 482.—It is impossible to doubt that Art. 134 of the Limitation Act is intended to refer to cases which are excepted in S. 10 of the Act. The Madras High Court has been of opinion that a mortgagee is not a purchaser within the meaning of the Article. But we think it ought to be understood in the sense of an alienee for consideration as the Bombay High Court has understood it. See *Attorney-General* v. *Davey*, 4 De J. and J. 136. Mr. Justice *Banerji* appears to us to have taken the right view. In the case of a mortgage by a preceding trustee, the possession by the mortgagee for a statutory period must give him a statutory title against the successor under Art. 144, if not under Art. 134.

Mul Chand *v.* **Ram Ratan**, I. L. R., 20 A. 493.—This case is an interesting application of the principle contained in S. 544 of the Code of Civil Procedure. Upon an appeal by the plaintiff, the appellate Court made an order of remand. Against this order one of several respondents, appealed and the remand order was set aside and the original decree restored.

The remaining defendants were not express parties to the appeal. The decision was on a common ground, and they took the benefit of the reversal. They could, of course, not execute the order of the High Court reversing the order of remand. The question, however, is whether they could not execute the decree of the original Court. Mr. Justice *Banerji* has held he could and, we think, the decision is a proper application of S. 544. The decree of the Court of last resort is, no doubt, the decree to be executed and to be amended under S. 206 in case amendment were needed. A person who was not by name a party to the decree of that Court is not precluded from executing the decree of a lower Court to which he is a party and which has been restored.

The N. W. P. Club through G. B. Goyder, Hony. Secy. *v.* **Sadullah,** I. L. R., 20 A. 497. The Secretary orders goods on behalf of a Club. We conceive it is open to the creditor to sue the Secretary person-

ally as a member of the Club for the price. He may sue all the members together or any of them. He cannot sue the Club through the Secretary any more than the Club may sue through the Secretary anybody else. See *Michael* v. *Briggs*, I. L. R., 14 M., 362. For the Club is not a corporation. But we think if the Secretary ordered the goods as the agent of the Club, all the principals being liable (See S. 226 of the Contract Act), it is open to the creditor to select any of the debtors as defendants in the action. The matter appears to us to stand in the same footing as a suit by the creditor of a partnership against any of the partners for recovery of the partnership debt. See *Lukmidas Khimji* v. *Haridas*, I. L. R., 6 B. 700. It would seem to us, therefore, that in the case under notice, though the Club was not liable in an action against the Secretary, the Secretary himself was liable as a member of the Club. The suit was against the succeeding Secretary who took the place of the Secretary that ordered the goods and if this man was a member of the Club at the time the goods were ordered, we fail to see how he can escape the liability.

Har Prasad *v.* **Sheo Ram**, I. L. R., 20 A. 506. Where a decree directs that on failure of the defendant, the mortgagor, the mortgagees were to obtain possession of the property and declares that they are to rema in inpossession until the mortgage-amount was discharged from the usufruct, the Court held that the decree was executed by the mortgagee obtaining possession and that there was nothing more for the executing Court to do. An application for the taking of accounts was dismissed on the ground that there was nothing further to be done by the executing Court and that the proper step was a suit for redemption. A similar construction was placed by the Privy Council in *Sri Raja Papamma Rao* v. *Sri Vira Pratapa, H. V. Ramachandra Razu*, I. L. R., 19 M. 249.

Makbul Fatima *v.* **Lalta Prasad.** I. L. R., 20 A. 523. The decision of the Full Bench does not commend itself to us as sound law. A mortgage-decree expressly directed that the costs were to be paid by the defendant. There seems to be nothing illegal in the passing of such a decree. S. 88 of the Transfer of Property Act, it is said, does not contemplate a personal decree for costs. But the power contained in the Procedure Code is certainly not taken away by S. 88 of the Transfer of Property Act and where that power has been exercised by an award of costs personally against the debtor, the executing Court has no business to whittle that away by treating the provision in the decree as surplusage.

SUMMARY OF RECENT CASES.

Will—Expectant share.—Woman past child-bearing.

In re **Hocking Michell** *v.* **Loe** [1898, II. Ch. D. 567 C. A.]

James Hocking by his will bequeathed certain annuities to his spinster sister A. and to E. L., another sister, the wife of J. L., and provided that, in the event of A. marrying and having children, his estate should vest and be divided equally between the children of A. and E. L., in equal shares, and this was to take place as soon as the youngest of these children should reach the age of 21 years. He further provided that, if A. should remain unmarried, all his property should go to the children of E. L. By a further clause he directed his trustees to raise a portion of the "expectant presumptive or vested share of any child" for B. for his or her support, education, advancement or benefit. In his will he omitted to provide for a contingency which actually happened *viz.*, that of A marrying but having no children.

Kekewich, J., held on a construction of the above will that the testator's residuary estate would, in the event of A. dying without children, remain undisposed of, and, secondly, that the clause empowering the trustees to make advances would cease to operate as soon as A. was proved to be past child-bearing. As at the date of the suit A. had married and become a widow of 54 years of age, he held that the trustees cannot exercise the power above-mentioned. On appeal this judgment was reversed, and the Court of Appeal held that the power of advancement continued in operation during the lifetime of A. They said that Courts ought not to enter into the question of A. being past child-bearing for the purpose of depriving the children of E. L. of the chance of becoming entitled to the property. The Court will never deprive a living person of a possible interest. The Court of Appeal distinguished the case *In re Lowman* (1895, II. Ch., 348) on the ground that no living person was deprived of any interest. In that case a fund was limited by a testator in the event which happened to the sons of his niece L. N. with remainder to the sons of his niece Flora. L. N. was 70 years of age and a spinster. The Court ordered the fund to be paid to Flora's sons during the lifetime of L. N.

Negotiable Instrument—Equitable assignment of debt—Notice.

Bence *v.* **Shearman** [1898, II. Ch., D. 582 C. A.]

The defendant was the owner of a public house, and, being desirous of selling it, employed A. to find him a purchaser in consideration of his

being paid a commission of £175. A. found the plaintiff Bence, who purchased the property from Shearman. A. was indebted to Bence the sum of £175 and shortly before the purchase he had transferred his right to receive the commission to Bence by a stamped document. After the completion of the purchase Shearman received the purchase-money from Bence, and for the commission due to A. gave him a cheque for the amount. Thereupon Bence informed Shearman of the transfer of the commission debt by A. to him and requested him to stop payment of the cheque to A. which Shearman refused. In a suit by Bence against Shearman for the sum, *Held* by the Court of Appeal that the suit ought to be dismissed. Where a man gives his creditor cheque or a promissory note for his debt, and he is afterwards given a notice that the debt, which is the consideration for the instrument, has been assigned apart from it, he can disregard that notice. Their Lordships held that to bind him with such a notice would be to put on him obligations which the law does not recognize and would enable persons to assign the consideration of a Negotiable Instrument in such a way that the debtor is not to pay the holder of the Instrument. To hold the contrary, they said, would be commercially disastrous. Compare *Ramachandra Rao* v. *Kuppusami Aiyar*, 8 M. L. J. 262 and *Patat Ambadi Marar* v. *Krishnan*, I. L. R, 11 M., 290.

Debt—Conditional payment—Effect of giving Cheque or Bill of Exchange.

Felix Hadley & Co. *v.* Hadley [1898, II, Ch. D., 680, per *Byrne*, J.]

The defendant agreed to sell his business as existing on the 31st of December 1887, with the good-will to the plaintiff's company, the latter assuming all the liabilities of the business as and from that date. The sale was to include " all book and other debts due to the vendor in connection with the said business and the full benefit of all security for such debts and of all contracts, engagements, rights and privileges of the vendor in relation to the said business." On December 31, 1887, the defendant had received some bills in payment of debts due to him which, however, had not been honored on that day. The plaintiff's company claimed the benefit of these bills under the clause above stated. *Byrne*, J., held that, as these bills were found to have been subsequently honored, the plaintiff was not entitled to the benefit of these bills under the above clause. For, firstly, the giving of these bills meant a conditional payment of debts for which they were given, the condition being that the bill will be duly honored; so then there were no debts unless these bills were dis-

honored. Secondly, these bills were not securities within the meaning of the above clause. For security means a running security for the debt which exists, and has not been conditionally or unconditionally paid. He held, however, that, if these bills had not been duly honored, the debts would have been revived and the plaintiff can claim them under the above clause.

Winding up of Company—Costs of action commenced before winding up.

In re **London Drapery Stores** [1898, II, Ch. D., 684, per *Wright*, J.]

The London Drapery Stores (Limited) commenced an action against B; but before the action came on for trial the Company went into voluntary liquidation. Subsequently voluntary winding up was ordered to be continued under the supervision of the Court. The voluntary liquidators then obtained the leave of the winding-up Court to continue the action, in which, however, he obtained judgment against the Company for his costs of the action. It was held by *Wright*, J., that, as the liquidators had adopted the action *ab initio* B was entitled to be paid his entire costs; not merely the costs as from the commencement of the winding up.

Master and servant—Liability of hirer for negligence of driver.

Jones *v.* **Scullard** [1898, II Q. B., 565, per *Lord Russell of Killowen*, C. J.]

The defendant was being driven in his brougham when the driver lost control of the horse which bolted and dashed through the window of the plaintiff's shop, doing considerable damage. The plaintiff sued the defendant for his loss which was caused by the negligence of the driver, the defendant's servant. The evidence showed that the brougham, horse, the harness, and the suit of livery which the driver was wearing were the property of the defendant. But the driver was a coachman employed by a livery stable-keeper at whose stables the defendant kept the brougham and the horse. For about a month previous to the date of the accident, the same driver had been driving him under a contract of hire between the defendant and the livery stable-keeper. The horse had been recently bought by the defendant and brought up to London only a week before the accident, and had been driven by the driver in question only three or four times. Under these circumstances, the defendant contended that the driver was not his servant, but that of

the livery stable-keeper, and that the latter was the person to be made liable for the driver's negligence. The Lord Chief Justice held, overruling the contention of the defendant, that the driver, though the general servant of the livery stable-keeper, was in the particular matter in which the accident happened the servant of the defendant, and decreed the plaintiff's suit.

As pointed out by the learned Lord Chief Justice, it is not at all impossible for a man to be in the practical relation of servant to employers. But it is impossible to lay down any definite rule of law on the point. No satisfactory line could be drawn at which, as a matter of law, the general employer of the driver ceases to be responsible and the temporary hirer becomes so. Such case must depend upon its own circumstances. The learned Lord Chief Justice, who exhaustively deals with all the cases on the point, does not himself lay down any definite rule of law. He says: "The principle, then, to be extracted from the cases is that, if the hirer simply applies to the livery stable-keeper to drive him between certain points, or for a certain period of time, and the latter supplies all necessaries for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver. But it seems to me to be altogether a different case where a brougham, the horse, the harness and the livery are the property of the person hiring the services of the driver."

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

The Albany Law Journal for December (*in exchange*).
The Calcutta Weekly Notes for December (*in exchange*).
The Allahabad Weekly Notes for December (*in exchange*).
The Green Bag for December (*in exchange*).
The Canadian Law Times for December (*in exchange*).
The Canada Law Journal for December (*in exchange*).
The Educational Review for December (*in exchange*).
The Indian Journal of Education for December (*in exchange*).
The Harvard Law Review for Nov. and Dec. (*in exchange*):

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Recent American decisions.

A person holding a mileage ticket who, with intent to board a train standing on a siding near a station, without going to the station, attempts to cross the main line, is held, in *Southern R. Co.* v. *Smith* (C. C. App. 5th C.) 40 L. R. A. 746, to be not a passenger to whom the

carrier owes extraordinary care or diligence, but only one of the general public entitled to ordinary care, if he has done nothing to notify any of the officers or agents of the carrier that he is a prospective passenger.

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The "heirs" who are entitled to a right of action for the death of a person under 2 Hill's (Wash.) Code, § 138, are held, in *Noble* v. *Seattle* (Wash.) 40 L. R. A. 822, to include the widow and children only, and not to include the parents of the deceased.

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Finding a bee tree on the land of another is held, in *State* v. *Repp* (Iowa) 40 L. R. A. 687, to give the finder no right to the bees or to the tree, and if he hives them and leaves them in a hive and on land, neither of which he owns, he is held to have no interest that can be the subject of larceny. With this case is a collection of the authorities on the subject of property rights in bees.

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Recovery for injuries occasioned by fright, as to which the authorities are conflicting, was recently allowed in *Mack* v. *South Bound* R. *Co.* (S. C.) 40 L. R. A. 679, although there was no physical injury sustained except that caused by the fright.

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An action by a wife against persons who have wrongfully induced her husband to leave her is held, in *Gernerd* v. *Gernerd* (Pa.) 40 L. R. A. 549, to be maintainable where she is free from common-law disablities and entitle to sue in her own name and right for torts done to her. But she is held to have no right of action against her husband's parents for advising him, in good faith, to separate from her.

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The father's duty to maintain a child after divorce, in the absence of any provision in the decree on the subject, is held, in *Re Zilley* (Wis.) 40 L. R. A. 579, to continue as before, and his promise to pay the mother for maintaining a child after the time when he was entitled to have the custody of the child under a decree of divorce granted for the father's fault is implied, although he has ineffectually tried to get the child and has declared that he would not pay the mother for his keeping.

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An order that the father pay for the support of minor children awarded to the custody of the mother by a divorce decree which made no provision for their maintenance is held, in *McKay* v. *Superior Court* (Cal.) 40 L. R. A. 585, obtainable by petition in the divorce case long after the decree had become final and the mother had re-married.

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An action by a divorced wife against her former husband for the maintenance of a minor child is upheld in *Gibson* v. *Gibson* (Wash.) 40 L. R. A. 597, when the father is found unfit to have the custody of the child, and this has been awarded to her.

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We take the liberty of extracting the following from an article on *The Lawyers* v. *The Rest of Mankind* that appeared in the Albany Law Journal.

* * * * *

Men go into litigation usually blinded by self-interest, passion and prejudice, and their testimony if not given wilfully falsely, is colored and warped by these conditions until its effect, intentional or otherwise, is to produce false effects. And it is often true that those who are loudest in their denunciations of lawyers, when in need of legal talent, are certain to seek the aid of some "shyster" who is held in contempt for dishonest practice by good men of his own profession, and offer him an extra large fee if he will practise his rascality for them. It is the business of the adversary lawyer to detect and expose the knavery of such people. Is there not enough in all this to make them sceptical of men's honesty and tempt them to practise the dishonest arts with which they are charged? But it is true that the great majority of lawyers scorn the temptations, and will stand higher tests as to integrity of purpose as a class, all things considered, than any other class. They see the worst side of humanity all the time. Whilst it is true that continuous contact with vice tends to dull the sharp appreciation of it, yet the lawyer being of necessity ever on the alert to detect and defeat the dishonest schemes of parties and witnesses, learns to know the futility of dishonesty. "It is said a lawyer ought to be a gentleman," but there is certainly no greater obligation on him to be a gentleman than on those who go into Courts as parties and submit their contentions. And as to all charges of "brow-beating," "bullying," etc., the writer has heard them repeated for years, and yet has rarely seen anything of the sort resorted to, unless provoked by the conduct of the party or witness. The person who goes into Court and conducts himself in an honest, straight-forward and respectful manner is very rarely disturbed by lawyers. The experienced lawyer, if he have ordinary judgment, knows better than to brow-beat or attempt to entrap the truthful witness, well knowing that all such efforts invariably injure his cause, prejudices Courts, jury and the public. It is also said the disreputable classes [should be debarred; granted, But to disbar the class of disreputable men who assume to be lawyers is easier advised than done. No one feels greater

contempts for such characters and greater humiliation that a great and honored profession should be disgraced by the ignorant and dishonest charlatans than the lawyer. But the profession is, to a great degree, powerless. They do not make the laws governing the admission to the bar, and the people resent any effort at restrictions, fearing that the Bar would become an aristocracy and would obtain too much influence and power. A lawyer, in practice, cannot afford to have controversies with the disreputable by instituting proceedings for disbarment, however much he may dislike the creatures. It is not so much a matter of interest to him as to the general public, and yet he sees the public constantly employing and paying well the pettifogger for the very conduct that would be cause for disbarment, and hears the dear public boast of how this or that "sharp" got them out of their "scrapes." The Bench could do much to rid the Bar of disreputable practices, but not so much as it should have the power to do. As to the objection made that the swindlers who speculate off the ignorant and unwary in cities always have the best legal talent to defend them, the Bar is in no wise responsible for this difficulity. The law gives no adequate remedies. The same men who do the swindling manipulate the political primaries and lobby the legislative bodies in which the able lawyer, who is competent to draft laws that would surely circumvent the swindler, is a *rara avis.*

When the respectable portion of community becomes willing to take an interest in these matters, and willing that lawyers may be paid a salary that will pay board at least, and see then that they are nominated and elected law-makers, there will be hope for legistative action which will meet all these causes of complaint, as well as many others. But while inexperienced young men and broken-down old men and ignorant politicians, who go for what they can make out of it, are legislators, no hope need be entertained for improvement in this or any other direction where abuses prevail.

Under the English common law, before a man could be admitted to the Bar, he was compelled to spend a number of years in study and preparation for the profession and pass rigid examinations. The rule that men shall produce evidence of having studied law and pass examinations, more or less rigid, prevails in most of the States. That examinations were and are often farcical is evidenced by many a story, more or less veracious, similar to this: The Committee appointed to examine the candidate asked, "Who made you?" The answer came quickly, "God, of course." "Who made God?" "I don't know." The Committee reported favourably, adding that the candidate had answered correctly

all questions asked but one, and that one the Committee could not answer. Law schools were lax in the matter of both instructions and examinations. But there has been rapid improvement. The necessity for better things has become apparent to the better class of lawyers, as a defence against the unfit. Many of the States are becoming more exacting in the matter of qualifications. The American Bar Association, which is really international, State and other Bar associations are pressing upon the profession and the country the necessity for high standards for men and qualifications. In all the States it is required that an applicant for admission to the Bar shall be a voter. But in this and some of the other States women are now admitted. I think Vigo County had the first woman lawyer admitted in the State, through the chivalry of a valued member of this Club.

But in the adoption of the State Constitution of 1852 the Constitutional Convention brought ridicule and disgrace upon the State, adding to its unmerited reputation for illiteracy by adopting as a part of the Constitution the following monstrous absurdity: "Every person of good moral character, being a voter, shall be entitled to admission to practise law in all courts of justice."

Evidently the members of that convention all wanted to practise law themselves, and knew their unfitness under any reasonable rule of preparation. * * * It has been supposed that under this provision the Courts had no power to regulate admission to the Bar, but later and better opinions now prevail. There is a saving clause in that constitutional absurdity. It requires a person to be of "good moral character." But what is good moral character? To a profane, dissolute, dishonest Judge, whom the "rest of mankind" entitled to vote have foisted upon a long-suffering profession, the requisites of a good moral character are such as will enable the candidate to keep pace with "his honor." Good moral character is a thing too elastic to hold any man to truth and honesty. It has as varied meaning as there are individuals. It will no doubt be said that as used here it means a consensus of opinions, or a sort of average. But when the question as to whether or not a person possesses such qualifications has to be submitted to a Court or jury upon evidence, it will vary as those interpreters vary in their judgment of what constitutes good moral character. In fact, there is no fixed or stable standard, and the saving clause amounts to nothing. And the profession in Indiana has had to suffer, and with them every citizen. The citizen ordinarily is not able to distinguish between the quack or charlatan and the reputable physician, and he is less able to recognize

the distinguishing marks of the shyster, barator, etc. Though I met a poor woman, a few days ago, who knew the shyster when she met him. The reptile had heard that she thought of getting a divorce from a husband who had abandoned her with two children five years ago, and he visited her, uninvited, several times, and urged her to employ him. She declined to yield to his blandishments. There has a new variety appeared (in this region), who partakes of the nature of the vulture. A man gets hurt whilst in the employ of some corporation; this bird will scent the carcass afar, and be sitting on the fence near by before the blood is washed off, and beg for a job to black-mail the employer, and if successful in getting the job, will take most of what he gets for his alleged services.

Again, he hears that some man is likely to die, it may be twenty miles away. He flies to the place, and hovering over the deathbed urges the dying to employ him to administer the estate. I heard of two of these foul birds flying a race, not long since, for such a chance. The defeated bird was badly disgusted. But, as I have said, these reptiles and vultures are not numerous, and, if the community would use reasonable intelligence and honesty in the choice of their counsellors, they would starve to death.

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Use of French Language in an English Court: The action of Mr. Justice Darling in sentencing a French prisoner in an English criminal Court in his own language is being somewhat sharply criticised by the legal press, on the ground that it is contrary to tradition and precedent, for the obvious reason that the sentence should be understood of the people, and further, that Judges are not and cannot be versed in the language of every foreigner tried before them, whether Chinese, Turk, Russian, Italian or French. An additional, and perhaps even more forcible, reason is that advanced by a correspondent of the *Law Times*, *viz.*, that the sentence, so as to admit of its becoming part of the record of the trial, should have been delivered in the English language. The learned Judge should have first delivered the sentence in English, and then, if he thought proper, he could have interpreted it to the prisoner in French, or ordered the Court interpreter to do so. This correspondent points out that since the time of Edward III., the English tongue has taken the place of French in the Courts of law, and, although the language in the statutes prior to the reign of Richard III. is generally in Latin or French, all Richard III.'s statutes are in English, and so they have continued to be drawn in all subsequent periods. But the whole matter may be said to possess little more than academic

interest, particularly for the poor devil in the prisoner's box, unless, indeed, there is something in the suggestion of a London contemporary that, unless the learned Judge's dialect was immaculate, the procedure constituted a wholly unjustifiable addition to the penalty imposed upon the prisoner.—*The Albany Law Journal.*

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The Joint Traffic Decision:—The Supreme Court of the United States, in the Joint-Traffic case, to which we made reference last week, refused to reverse itself. If consistency is a jewel noted for its rarity, then the legal profession and the commercial world ought to rejoice that the highest Court in the land has refused to be inconsistent. Mr. Justice Peckham's declaration that the Court had been unable to distinguish any difference between the Joint-Traffic case and the Trans-Missouri case really covers the whole matter in a nutshell. We believe that a careful and dispassionate investigation of the controversy and the facts involved will show that the Supreme Court is clearly right in declaring the Joint-Traffic Association illegal under the Interstate Commerce Act and the Anti-Trust Law. The thirty-two railroads embraced in it, including all of the great transportation lines operating east of the Mississippi and north of the Ohio, organized in October 1895, and had some of the ablest counsel in the country to guide them. In view of numerous decisions, whose force and effect it sought to evade, it did not "make" rates, but merely "recommended" them. The rates themselves, we are told, were fixed by the companies concerned. We are also informed by the Philadelphia Press, that the object of the Association was not to advance rates, but to maintain them; that the board of control of nine, the board of three commissioners or managers, and the three arbitrators were only "advisory," the companies themselves being the final and only actual authority. Each company collected its own rates and made its own rates. The differentials by which these rates were kept uniform were determined by the managers, passed upon by the arbitrators, and affirmed by the board of control, but the companies, we are assured, in the end made the rates. It is added: "Under this simple but carefully devised plan 'agreements' as to rates were avoided, 'pools' were eschewed and the delegation of corporate powers was guarded against. The railroads were, it was argued, simply provided with suitable machinery by which each could be advised as to the fairest rate, all things considered, and, having learned this rate, each agreed on its own account and in its own interest to maintain it, and, having reached this conclusion, forfeited £5,000 if it failed to keep the rate." Justice Peckham, in his characteristically vigorous way, brushes aside the varnish of

sophistry with which shrewd counsel sought to cover the tell-tale joints in their handiwork, and frankly declares the inability of the Court to distinguish any difference between the agreement under consideration and the one set forth in the Trans-Missouri case; in other words, it was another instance of tweedledum and tweedledee. The natural and direct effect of the two agreements, the Court declares, was the same, *viz.* to maintain rates at a higher level than would otherwise prevail, and hence the differences between them were not such as to call for different judgments in the two cases on any such grounds. It must be conceded, it seems to us, that in both cases there was an agreement—no matter by what particular process it was reached—to keep up rates, and that being the fact, competition was not allowed its natural scope and effect. It will not do to say that under the operation of the Joint-Traffic Association rates were reasonable and just; that the cost of transportation being such a large element in the price of goods, it is quite as important to have rates uniform and stable as to have them low (of course, rates both stable and low would be still better), and that when rates are being cut right and left, it is the big shipper who obtains advantage over the little one. The disastrous results that frequently accompany over-competition may be conceded, at the same time it may well be doubted whether they are comparable to the evils of monopolistic regulation of rates. Under the operation of immutable and beneficent laws, the former evils will correct themselves, in time, through the "survival of the fittest," but with rates arbitrarily fixed by the transportation companies themselves there is always a liability to tax the traffic all it will bear rather than what would be fair and not a reasonable profit to the companies, to say nothing of the over-capitalization and dishonest management features. We are aware that the English Courts of last resort have for years held the view that agreements to maintain rates by common carriers are not in restraint of trade. It was decided in the "Mogul freight cases," in effect, that trade is impossible unless men bargain freely, and that men cannot bargain freely, unless they are free to decide when and how to bargain. From the English Court's view that it is practically impossible to discriminate between individual and collective bargaining, and that both must be left free if freedom is to be retained by each, we most respectfully dissent. We venture the assertion that every Joint-Traffic Association ever organized was compelled to depend for success upon its ability to coerce certain of its members into compliance with the rules and rates agreed upon, as is shown by the system of fines and penalties imposed upon violators, and free action is hardly compatible with coercion, however cunningly it may be disguised by shrewd and clever counsel.

On the general effect of the decision, the Philadelphia Press remarks: "The Supreme Court decision establishes the law. It must be obeyed without evasion, and will be. The experiment of extreme competition must now be carried to the end. Both Congress and the Courts have decided upon this, and while yesterday's decision should lead to a pooling act, there is grave danger that it will not. Last winter the railroads, secure in successive decisions in their favor, ceased to urge the enactment of the measure for which they had earlier clamored. A new campaign must now be begun with the present decision against it. Such an act should be passed, for, while the law and the Courts are against the regulation of competition, public policy is the other way. It is only necessary to contrast the stable, profitable and secure English railroad and industrial corporations under a system permitting and fostering pooling and our own without this safeguard for labor, trade and capital. The bankruptcies, the 'reorganizations' and the drastic economies of unrestricted competition work untold hardship to labor by rendering employment precarious, derange industry and destroy capital. The attempt to prevent any regulation in competition plunged over one-third of our railroads in the hands of receivers and for six years stopped the growth of our railroad system. Why should men invest in railroads whose very existence can at any time be put in jeopardy by reckless competition?

"By its decision the Supreme Court has at least cleared away all doubt and carried the system of destructive competition to its final term and last extreme. Railroads are left to cut and harry regardless of returns, and it is possible that worse must be before better can be had. It is at least true that the current decision has come when railroad managers have been demonstrating that even the Joint-Traffic Association cannot prevent destructive cutting in rates by respectable corporations and reputable managers." It may be conceded that the Joint-Traffic Association, cunningly devised as it was, being illegal, no joint action between railroads is possible without additional legislation. To this end the railroad managers will doubtless address themselves at once, and their activity is likely to take the form of an attempt to induce Congress, at the earliest possible moment, to pass a law permitting the railways to organize and conduct traffic organizations under the supervision of the Interstate Commerce Commission.

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Legal Laughs.

A lawyer in Court the other day, after a close cross-examination of a witness, an illiterate Irish-woman, in reference to the position of the

doors and windows, etc., in her house, asked the following question: "And now, my good woman, tell the Court how the stairs run in your house." To which the good woman replied: "How do the sthairs run? Shure, whin I'am opp sthairs they run down, and whin I'am down they run opp."—Household Words:—*The Albany Law Journal.*

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Horace Greeley—he used to tell the story himself—once sent a claim to a western attorney for collection, the attorney to keep half the amount for his fee. After a time Mr. Greeley received the following note from the lawyer:—

"*Dear Sir:*—I have succeeded in collecting *my half* of that claim. The balance is hopeless."—*The Albany Law Journal.*